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**INVESTIGATION OF THE PUBLIC OWNER'S LIABILITY  
AND RESPONSIBILITY IN CONSTRUCTION  
CONTRACT INJURY PREVENTION**

**1990**

**DIRK E. BERRY**



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The Pennsylvania State University

The Graduate School

Department of Civil Engineering

INVESTIGATION OF THE PUBLIC OWNER'S LIABILITY  
AND RESPONSIBILITY IN CONSTRUCTION  
CONTRACT INJURY PREVENTION

A Thesis in  
Civil Engineering

by

Dirk E. Berry

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Submitted in Partial Fulfillment  
of the Requirements  
for the Degree of

Master of Science

May 1990

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Professor of Civil Engineering  
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## ABSTRACT

The objective of this thesis is the determination of the extent of the owner's liability in the event of an injury to a construction contract worker. The existing environment of jobsite safety is reviewed and a case study, where the owner of the contracted facility is a major university, is considered. The framework of liability surrounding the employer is investigated with emphasis on interpretation of Pennsylvania statutes and case law. The framework of liability surrounding a third party is investigated with emphasis on the construction contract environment. The two frameworks are contrasted and an investigation is made of the conditions that determine whether the owner is liable as an employer or as a third party. The conditions are summarized as two sets of specific criteria. The two sets of criteria are applied to the case study university as a laboratory example. Recommendations for predicting or controlling liability as an owner are made both for the case study university and for the general case.





## TABLE OF CONTENTS

## Page

LIST OF FIGURES.....	x i
ACKNOWLEDGMENTS.....	x ii
Chapter 1 - THE CONSTRUCTION INJURY LIABILITY ISSUE.....	1
Introduction.....	1
Background.....	2
The Liability Environment.....	2
The Legal Identity of the Owner.....	4
Introduction to the Laboratory Example.....	6
Problem Statement.....	7
Thesis Objectives.....	8
Methodology .....	8
Silence in Current Safety Management	
Literature on the Issue of Liability.....	9
The Stanford Studies.....	10
Other Academic References.....	13
The Safety Survey.....	13
The Safety Survey Objective.....	14
Safety Survey Results.....	15
Summary.....	16
Chapter 2 - WORKMEN'S COMPENSATION AND THE LIABILITY OF THE EMPLOYER.....	18
Introduction.....	18



The Pennsylvania Workmen's Compensation Act .....	18
The Intention of the Workmen's Compensation Act .....	20
Examination of the Workmen's Compensation Act .....	21
Limitations of the Workmen's Compensation Act .....	21
Contravention of Common Law .....	22
The Employer as Insurer .....	23
Recovery Amounts Provided by the Act.....	24
Rejection of the Act.....	25
Stipulations Limiting Rejection of the Act .....	26
Exclusiveness of Remedy.....	27
The Strategy of Exclusiveness of Remedy .....	27
The Statutory Employer.....	30
The Scope of the Discussion .....	31
Identification of the Statutory Employer .....	31
Challenge to the Interpretation .....	33
Prerequisites: The Three Criteria Test .....	34
The Original Five Criteria .....	35
The Three Criteria Test Expanded .....	35
Criterion 1: Contractual Relationship .....	36
Criterion 2: Occupation of the Premises .....	36
Criterion 3: The Normal Course of Business.....	37
Avoidance of Statutory Employer Responsibility.....	39





Incidental Employment.....	39
Casual Employment .....	40
Outside the Regular Course of Business .....	40
Volunteer Workers .....	41
Injuries to Employed Minors.....	42
Summary .....	43
<b>Chapter 3 - LIABILITY OF THE OWNER AS A THIRD PARTY.....</b>	<b>45</b>
Introduction .....	45
Third Party Status.....	45
The Owner's Opponents in Tort Actions.....	46
The Employee.....	47
The Pennsylvania Employee .....	50
The Least Limiting Criterion .....	50
Lack of Limits on Amounts .....	51
The Employer.....	52
Pennsylvania Specific Cases .....	53
Comparative Negligence .....	54
Points in the Owner's Favor .....	55
The Insurer.....	55
General Cases .....	56
Pennsylvania Specific Cases .....	57
Subrogation.....	57
Pennsylvania Specific Cases .....	58
Election.....	60



Negligence.....	60
Defining Negligence .....	61
The Three Categories of Negligence .....	62
Category 1: Active Negligence .....	63
Category 2: Vicarious Negligence .....	64
Category 3: Negligence by Ratification .....	65
Tort Reform .....	65
Owner's Guide .....	66
OSHA as a Private Cause of Action.....	66
Indemnity.....	68
Indemnity Clauses .....	69
Extended Indemnity.....	70
Summary .....	71
<b>Chapter 4 - DEFINING THE OWNER AS EITHER THE EMPLOYER OR AS A THIRD PARTY.....</b>	<b>73</b>
Introduction .....	73
Owner-Employer Definitions Nationwide.....	73
The Silence of the Reference Texts .....	74
The Choice of a Single State Example .....	75
Interpretation of Pennsylvania Workmen's Compensation Statutes.....	76
Categories Evident in Pennsylvania Case Law.....	77
The Master-Servant Relationship.....	77
The 4-Criterion Test .....	78
The First Criterion of the 4-Criteria Test .....	79
The Second Criterion of the 4-Criteria Test .....	80





The Third Criterion of the 4-Criteria Test .....	80
The Fourth Criterion of the 4-Criteria Test.....	81
Importance of the Third and Fourth Criteria .....	81
The Concept of "Rights" .....	82
Summary of the 4-Criteria Test .....	83
 The Independent Contractor.....	84
Independent Contractor Status Tested .....	86
Degree of Control .....	87
Limitations to Contractual Language .....	88
Requirements for a Status Change .....	89
 Rental Equipment With Operators.....	90
Role Reversal .....	91
Application to the Owner .....	92
 The Statutory Employer.....	93
Owner Options .....	94
Determination of Owner Status Using the 3-Criteria Test .....	95
The First Criterion of the 3-Criteria Test .....	95
The Second Criterion of the 3-Criteria Test .....	96
The Third Criterion of the 3-Criteria Test .....	96
The Owner as Statutory Employer.....	97
Attempts to Abuse the System .....	99
The Westinghouse Cases .....	99
Early Foundation for Limiting Abuse of the System .....	100
 Other Special Cases Affecting Employer Status - Agency and Knowledge of Skills.....	102
Agency .....	102
Agency Defining the Owner's Role .....	103
The Conditions for a Status Change .....	103
 Two Strategies for Making the Owner an Employer .....	105



Summary.....	106
Chapter 5 - CONCLUSIONS.....	108
Introduction .....	108
Summary .....	108
The Safety Liability Environment ... ..	108
The Proof of the Problem .....	109
The Need for the Research Reviewed .....	110
The Owner's Roles .....	110
The Employer's Liability .....	111
Exclusive Remedy .....	111
Statutory Employer Liability .....	112
Minor Points Related to Employer Liability .....	112
The Liability of the Third Party .....	113
Subrogation and Related Points .....	113
Negligence .....	114
OSHA Violations .....	115
Indemnification .....	115
The Determination of Roles .....	116
The Criteria Tests and "Rights" .....	117
Agency and Skills .....	118
Conclusions .....	119
Application of the Above Findings to The Laboratory Example: Penn State.....	119
Current Measures .....	120
Assumption of Third Party Status .....	120
Indemnity Clause Review .....	121
Avoiding the Assumption of Negligence .....	122
Active Negligence .....	122
Vicarious Negligence .....	123
Ratification .....	124
Imminent Danger .....	124
Safety Forms .....	125
The Laboratory Example Summary .....	126



Recommendations.....	126
The Possibility of Completely Avoiding Liability .....	127
The Reverse Determination Option .....	127
Possible Directions for Future Research .....	129
REFERENCE CASES .....	130
BIBLIOGRAPHY .....	138
Appendix A - THE D.E.E.P. L.E.F.T. SAFETY SURVEY FORM .....	142
Appendix B - DEVELOPMENT AND USE OF THE SAFETY SURVEY .....	146
Appendix C - FINDINGS OF THE SAFETY SURVEY .....	154
Appendix D - EXAMPLE OF A COMPLETED D.E.E.P. L.E.F.T. SAFETY SURVEY FORM .....	165
Appendix E - DEFINITIONS OF SOME LEGAL TERMS .....	168





## LIST OF FIGURES

Figure		Page
1	Overall Concept Flowchart.....	5
2	Employer Liability Model.....	19
3	General Third Party Liability Model.....	48
4	Pennsylvania Third Party Liability Flowchart.....	49
5	Owner's Five-Point Guide to Basic Negligence.....	67
6	Determination of Owner Status as Employer or Third Party.....	85



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## Chapter 1

### THE CONSTRUCTION INJURY LIABILITY ISSUE

#### Introduction

With increasing awards to individuals injured in the workplace and the growing use of the "deep pockets" approach to recovery in lawsuits, it is important that owners of constructed facilities understand their responsibility for workplace injuries and how to control their liability during the construction phase. Even a single mistake in this arena can cost hundreds of thousands or even millions of dollars in addition to the human suffering that could have been prevented.

The owner desiring a facility contracts with one, or more, contractors, each of whom may also subcontract various portions of the facilities construction. This combination of multiple contractors on the site, none of whom are the eventual owner or user of the facility, along with the current state of the art of workmen's compensation laws has created a veritable judicial minefield for the owner administering multiple construction contracts.

Using Penn State as the "laboratory example," this thesis examines the need for, and provides recommendations about construction contract administrative procedures that properly delineate responsibility and minimize erroneous placement of liability. This is accomplished by an investigation of the current construction safety conditions, climate of litigation, workmen's compensation legislation, judicial decisions relating to





the owner as "employer" or as "third party," and the rules of law. The circumstances and conditions upon which these determinations pivot is also examined.

### Background

The subject of Construction Safety has been increasingly recognized as a vital part of the process leading to the successful completion of construction projects. Numerous books and articles have been written extolling the virtues of safety on the construction site. However, accidents are still occurring. Along with the continued search for ways to best reduce the rate of occurrence of accidents, there is an obligation to consider a proper response to accidents which occur and cause injury.

An important part of the response relates to defining responsibility and assessing damages. We live in a society that recognizes the assumption of certain responsibilities by the individual for others. The failure to properly discharge those responsibilities and thus have an injury result, is believed to be sufficient reason to assign an obligation to the irresponsible party to pay for the unfortunate occurrence's costs.

### The Liability Environment

The determination of responsibility, because it is not always equally obvious to all the parties involved, has often become a matter that must be settled by the courts. Unfortunately, the differing circumstances and the vagaries of interpretation by numerous individual judges have left many of



the affected parties with some doubt about what their responsibility will be in future situations. The rapid growth in recent years of the monetary value awarded to the injured party in cases of negligence and failed responsibility has added to the urgency of the situation.

Thus, an environment exists where owners recognize their vulnerability to being judged the responsible or liable party, but do not have a clear delineation of when or under what circumstances this may occur. The penalty for guessing wrong in the current litigious climate can be very steep and may exceed a company's or organization's ability to pay and still remain solvent.

Parties considering themselves vulnerable often carry increasing levels of insurance to protect themselves against a financially disastrous determination in the courts. However, this places the burden of resolving the same question upon the insurance companies who characteristically respond to unknown levels of risk by raising their premium rates to cover themselves. The organization at risk in the first place now finds itself paying hefty sums in advance of any error on its part. These sums can be large and are increasingly becoming so great a burden that smaller companies are finding they cannot afford to do business. Larger companies and municipalities are likewise being strained by the size of the premiums and may feel they are effectively subsidizing the mistakes of others.

The above situation is particularly critical for owners who operate with, and are responsible for, the disbursement of large amounts of maintenance and construction funds. The responsibility to the worker and the passers-by carries with it both a moral and a financial obligation for safety. Due care must be given to how these funds are administered. The



building contracts must be paid for and all contingencies covered as well. Additionally, on the more personal level, the past failures of some officials who have betrayed their trust have lead to a recent movement in the judicial system of holding the individual official personally responsible in some tort actions.

### The Legal Identity of the Owner

Defining the responsible individual involves establishing the legal identities of the involved parties. It is crucial, in the owner's attempts to reduce legal vulnerability, that the various legal identities or roles in the proceedings are understood. Most important are the roles that the owner may have to assume.

This question of the proper legal identity of the owner, following a construction injury, will be pursued as the central theme of this thesis. A diagram of the flowchart showing the general relationships that will be developed is presented in Figure 1. While these relationships are not documented until later chapters, an early appreciation for the central question and general direction of the research is believed to be useful in assisting the reader in his interpretation of the author's presentation.

One method of defining the roles of the parties is through the language of the contract. Increasing attention has been given to the documents that form the agreements between parties where safety can become an issue. These documents, and the roles they define, are a primary source used by the courts to determine culpability and responsibility. Therefore, it is in everyone's best interest if these documents are clear and precise at the start,



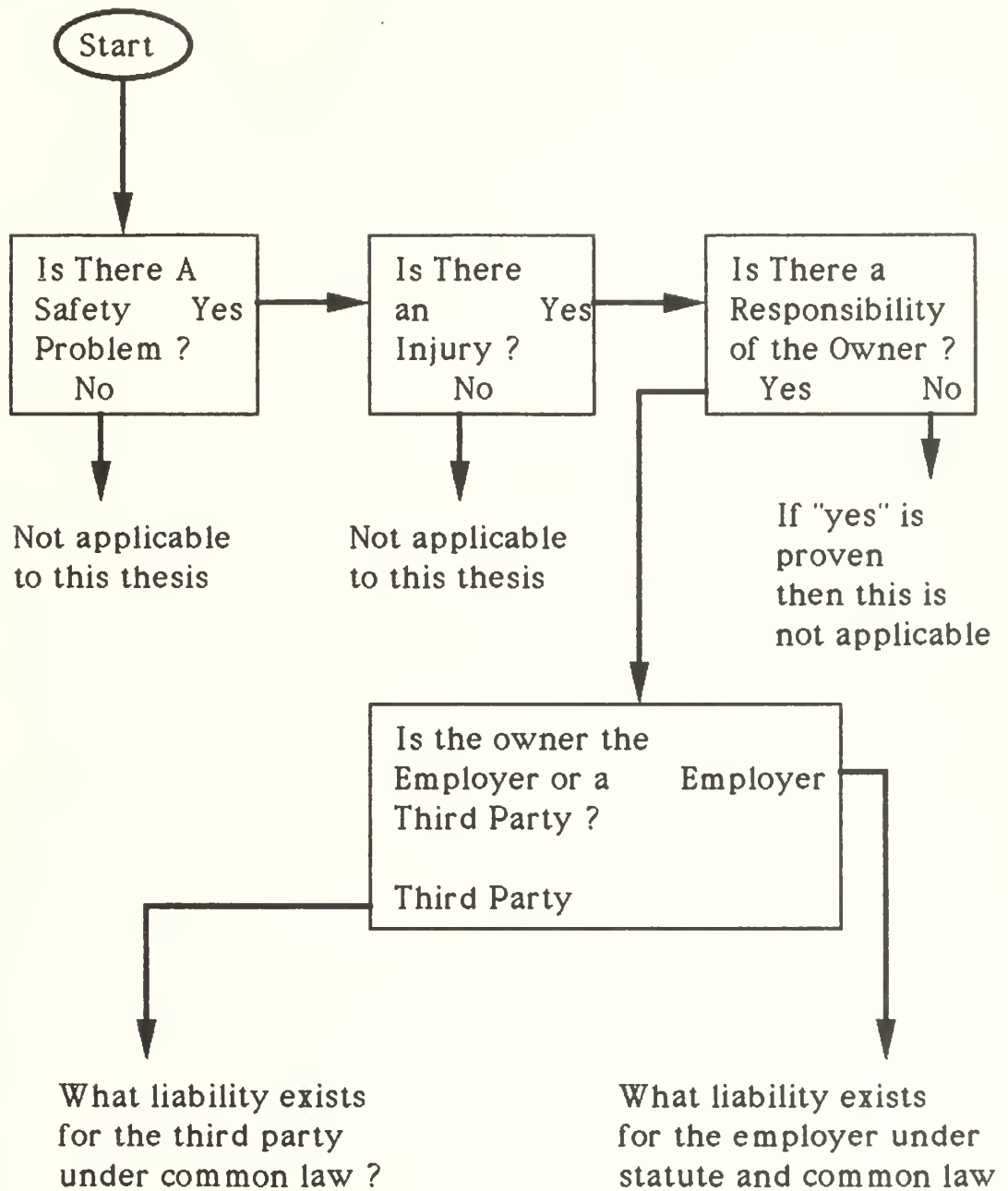


Figure 1. Overall Concept Flowchart





so that no disagreement about responsibility can exist. Unfortunately, this is not yet the case in most construction contracts. However, many of the alternatives that have been tried are already tested in court. These alternatives are examined throughout this thesis for their effect on defining the owner's role and responsibility.

### Introduction to the Laboratory Example

Part of this research effort was identified as a snapshot look at the existing vulnerability of an owner and the subsequent development of recommendations to that "laboratory example" owner. This included an application of the principles that were investigated in this thesis. The laboratory example owner chosen for use in this thesis was Penn State.

The Office of Physical Plant (OPP) at Penn State has recently been reorganized to include a separate "Construction Contracts Management" division. This division is responsible for the review, award, administration and inspection of construction contracts at the university. The division has been organized in a fashion similar to an Army Corps of Engineers contracts office or a Navy Officer in Charge of Construction (OICC) contracts office. Along with many other concerns, this owner is interested in resolving the issue of safety responsibility on the part of the university and proper placement of liability in their contract documents so that construction accidents are minimized and restitution to the injured will not produce any unforeseen financial burdens to the university.

Because the university may be viewed as having "deep pockets," a poorly written clause in a construction contract could conceivably divert the



safety responsibility onto the university when it should more properly reside elsewhere. This situation hurts the university and the public as well, since it is the public's taxes that may ultimately pay for any judgement against the university. Therefore it is important that the university's contract documents minimize the possibility of erroneous placement of liability on the university.

However, there is evidence that no owner can ever shed all responsibility for safety in a project even when only indirectly connected. Knowledge of the amount of liability that must be assumed in the exercise of that appropriate level of responsibility is important because it affects planning budgets and insurance coverages. It is currently unclear what that level is for construction contracts, and how that responsibility, once identified, should be most properly discharged.

### Problem Statement

The liability of owners who are constructing facilities is not well defined in the event of an injury to a construction worker. The owner may be liable under workmen's compensation statutes or liable in a "third party" tort action. The current literature does not contain a comprehensive definition of the extent of this liability and the factors that determine it.

Penn State's new Construction Contract Management Division desires to have safe construction sites and can employ inspectors to help in this regard. It does not, however, want to assume liability that is not rightfully its own. Managers in charge have expressed an interest in the extent of the



sufficiency of the wording in their current documents. If it is inappropriate, they are interested in suggested revisions.

### Thesis Objectives

The objectives of this thesis are threefold:

First, to develop the legal principles as determined by current case law and statute that define and determine the Owner's responsibility and liability for a construction contract accident that results in a personal injury.

Second, to develop, from the case law investigation, those options which the owner can use in its contract documents and procedures to allow it to exercise proper responsibilities for safety on the project without unduly exposing itself to liability that should be assumed by another party.

Third, to apply these principles to the existing construction contract environment at Penn State in the summer of 1989 and indicate the practical results that can be expected under current conditions.

### Methodology

This research was initiated with a comprehensive literature search. Penn State was chosen as the location for the field study and an original safety survey form was developed using OSHA as the guideline. The safety survey was conducted at 4 Penn State construction sites for a total of 36 site



visits. Additional data on current operations were obtained from meetings with Penn State's Office of Physical Plant (OPP) personnel and Penn State's lawyers.

A comprehensive search of existing case law and statutes was performed. The search concentrated on the areas of construction safety, workmen's compensation, liability, negligence and definitions of "employer." The results of this search were used to develop the models and criterion tests presented in this thesis.

The models and criterion tests were applied to current operations at Penn State. Recommendations were developed based on the models, criterion tests, safety survey results and estimates of current operations established in the initial meetings. The recommendations were extended to the general case.

### Silence in Current Safety Management

#### Literature on the Issue of Liability

The state of the art in safety management is much improved over what it was 50 years ago. The efforts of OSHA and management experts have resulted in the introduction of guidelines and techniques that have proven effective in reducing workplace injuries. Concurrently, worker awareness of hazards has increased, further reducing the occurrence of injuries. However, the most recent and current publications are still deficient in addressing the post-injury problems of compensation and liability.

Several excellent references are currently published that cover the hazard identification and program implementation arenas in exhaustive





detail. Of particular note is David Goldsmith's Safety Management in Construction and Industry (1987). Goldsmith concentrates on a "hands-on" approach to program implementation and includes numerous practical examples and several checklists that can be modified for a particular construction site's conditions. Also of note are Robert Firenze's book on The Process of Hazard Control (1978) and Keith Denton's Safety Management: Improving Performance (1982). Firenze includes a section on product liability that includes definitions of some legal terms. However, there is no further development of legal applications to construction safety and liability. Denton makes a strong case for the ability of the trained safety professional to manipulate human behavior patterns. Regardless of whether you agree with the ethical questions raised by his "safety professional versus the sheep" approach, it is clear again that the existing research and informed opinion are written to emphasize management attention as the tool for achievement of a safe jobsite. After this point is made the injury issue is ignored, as if sufficient attention to prevention could eventually eliminate all injuries.

### The Stanford Studies

Several safety studies were performed in the 1970's by Stanford University and published as technical reports distributed by the Construction Institute. While all are excellent sources of construction management information, all are silent on the liability issue.

Lance William deStwolinski, working under the guidance of Clarkson Oglesby, published Occupational Health in the Construction Industry.



(1969a). The report addressed the hazards facing the construction worker, with a special emphasis placed on the increased hazards brought about by modern methods with their increased use of power machinery and corrosive chemicals. It was intended to serve as a "call to action" for the industry and the author hoped it would generate increased awareness and better occupational health and safety programs.

An additional report, A Survey of the Safety Environment of the Construction Industry (1969b), was published by deStwolinski six months later and consists of the raw data collected by his survey efforts in support of the previously published report (1969a). This report contains the survey responses of Operating Engineers Local Union No. 3 and is the foundation work for the development of deStwolinski's contention that better safety programs were needed in the construction industry.

Raymond E. Levitt's doctoral dissertation was published as Technical Report No. 196, The Effect of Top Management on Safety in Construction (1975). Using the perspective that 80% of all accidents are the result of unsafe acts rather than unsafe conditions, he proposed that top management could improve safety significantly by making a larger investment in job training programs.

Jimmie Hinze published a similar report focusing on middle management (1976). However, his conclusions were as nebulous as the definition of the role of a "middle" manager and in the author's opinion consisted largely of an exhortation to get more involved.

Perhaps the best of the three-part series on effects of management on safety is Nancy Samelson's The Effect of Foremen on Safety in Construction (1977). In this report Nancy Samelson develops specific criteria that are



indicative of successful, safe foremen and further reinforces her conclusions with several case studies. She concludes that the methods employed by the foreman should reduce crew stress while he shoulders the responsibility of carefully shepherding new workers and providing everyone with a specific set of job rules that provide for safe and effective practices.

Michal Robinson developed a method of accounting for the costs of a construction accident and for assigning it to the person or group responsible (1979). It was hoped that this would provide managers with both positive and negative incentives to promote safety in their jobsites.

Finally, Technical Report No. 260, Improving Construction Safety Performance: The User's Role, by Levitt, Parker and Samelson (1981), prepared as part of the Business Roundtable Construction Industry Cost Effectiveness Project, addressed the direct and indirect costs of construction accidents and outlined some thoughts about the selection of a safety conscious contractor.

The Stanford efforts highlighted the existing problems in safety management in the construction industry and identified the fact that there is considerable room for improvement. However, the only mention of the liability issue was in connection with a brief acknowledgement of workmen's compensation. Third party claims were not addressed, except in Report No. 260 (Levitt, Parker and Samelson, 1981), which specifically noted that it would exclude third party claims from consideration.



### Other Academic References

Briefly confirming that stance in recent academic literature are Naoto Narahara (1988) and William A. Stanton (1988). Both reports, published at Penn State, focus on management actions to promote safety and neither addresses the liability concern. Also continuing this trend in the academic arena is the book by Donald Barrie and Boyd Paulson (1986). The chapter on safety continues the focus on management and continues to neglect liability for an accident.

### The Safety Survey

The research plan for this thesis required observations related to an owner who was conducting major amounts of construction in a reasonably routine fashion. This was necessary in order to verify that the status quo, even if it had not been the cause of a litigious accident in the past, was indeed still vulnerable to that occurrence in the near or even immediate future.

A major assumption made by the author is that current contract administration procedures do not fully address the owner's liability question and thus leave the owner more vulnerable to litigation following an injury than perhaps it should be. Of particular note is the situation at Penn State. The standard construction contract provisions (1989) specify that the contractor is required to follow codes and OSHA. Nothing else about safety is mentioned.





It was felt that prior to performing the research it was necessary to verify that there was a sufficiently large enough problem to make the investigation worthwhile. Due to its geographical proximity and the immediate availability of several active construction sites, Penn State was chosen as the most desirable area for the survey, assuming that it fit the profile needed for the thesis's purpose.

Penn State fit the above requirements. The Office of Physical Plant at Penn State continuously administered multiple maintenance and construction contracts with relatively large dollar values. Construction was currently ongoing and the standard contract form was silent, except for the codes and OSHA reminder, about both safety and liability. It could have been by oversight or it could have represented a deliberate attempt to distance Penn State from liability by avoiding any administrative recognition of its likelihood. In either case the situation was ideal for the investigation of the problem upon which this thesis was based.

### The Safety Survey Objective

Should the survey discover that recognized safety problems were in existence, then by extension an accident was possible in the short-term future. This would then raise the question of liability. The contract documents being silent on this issue would then force the conclusion into the arena of existing legislation and case law. It could then be concluded that the question was worthy of investigation since an adverse decision could cost the loser hundreds of thousands or even millions of dollars. If, on the other hand, the survey found that there were no significant safety problems in



existence then either Penn State was a poor experimental example, or the subject was not practical as a thesis topic.

### Safety Survey Results

As expected, the survey revealed that numerous significant safety hazards were commonplace on the job sites surveyed. The conclusion of contributive worth of this thesis was verified and the issue of the owner liability question was deemed worthy of investigation. That discussion continues in Chapter 2.

Detailed information on the survey is contained in the appendices of this thesis. A blank survey form (reduced to 80% size because of publication limitations) is contained in Appendix A. The development and use of the survey is covered in Appendix B. The results of the survey, by site and by survey category, are discussed in Appendix C. Lastly, an example of a completed survey form (also reduced to 80% size) is included as Appendix D.

A cautionary note is in order. The survey form was developed as part of the academic exercise of this thesis process. The reader is warned that it is not presented as a safety or management tool. It was effective for its purpose but that is now complete. Any further use of this form by any reader of this thesis is not recommended. The author specifically does not intend this survey form to be used in any safety related or safety management program.



## Summary

The author's intent in Chapter 1 is to introduce the reader to the general environment of construction contract injury liability. Concurrently, a major focus of the chapter is demonstrating the current lack of definitive information regarding the owner's construction injury liability. This lack of information coupled with the daily possibility of serious injury on construction sites establishes the need for research in this area. This need is reviewed below. The remainder of the thesis attempts to make a significant contribution in addressing this need.

Safety management literature includes numerous published methods for developing programs and attempting to motivate participants, but almost nothing has been published referring to the owner's liability in the event of a personal injury. At the same time, OSHA has a large definitive body of regulations that defines work standards, but is silent on responsibility, except to designate the employer as the one who must apply the standards.

The current legal climate apparently differentiates between the employer and third parties and allows varying liability that may be not limited to who was most at fault. Along with that, the circumstances defining the owner as either the employer or a third party are not clear.

A study of 4 job sites in the "laboratory example" indicated that numerous hazardous situations routinely existed. The contract provisions for these four job sites only addressed safety responsibility and liability to the extent that, in two short paragraphs, the contractor was advised of his responsibility to comply with local codes and OSHA.



The contention that a significant enough problem exists was proven with the site study. Therefore, it is concluded that the questions posed by this thesis are worth investigating.





## Chapter 2

### WORKMEN'S COMPENSATION AND THE LIABILITY OF THE EMPLOYER

#### Introduction

This chapter discusses the liability of the employer, which is one of the two legal roles in which the owner may find itself. In the "employer role" the liability is closely controlled by statute. Each state has a different set of statutes that control this liability, even though there are similarities due to standardization created by federal legislation.

Because of the "state emphasis" this chapter will primarily focus on the workmen's compensation and statutory regulation which relate to case laws and interpretations in the Commonwealth of Pennsylvania. A flowchart which defines the principles developed in this chapter is provided in Figure 2.

#### The Pennsylvania Workmen's Compensation Act

Until 1915, the Constitution in Pennsylvania did not allow any limitation of an individual's right to recover for injuries or damages to property. An amendment was passed in 1915 which allowed for the establishment of a Workmen's Compensation Act. An excerpt from that amendment stated, "The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable



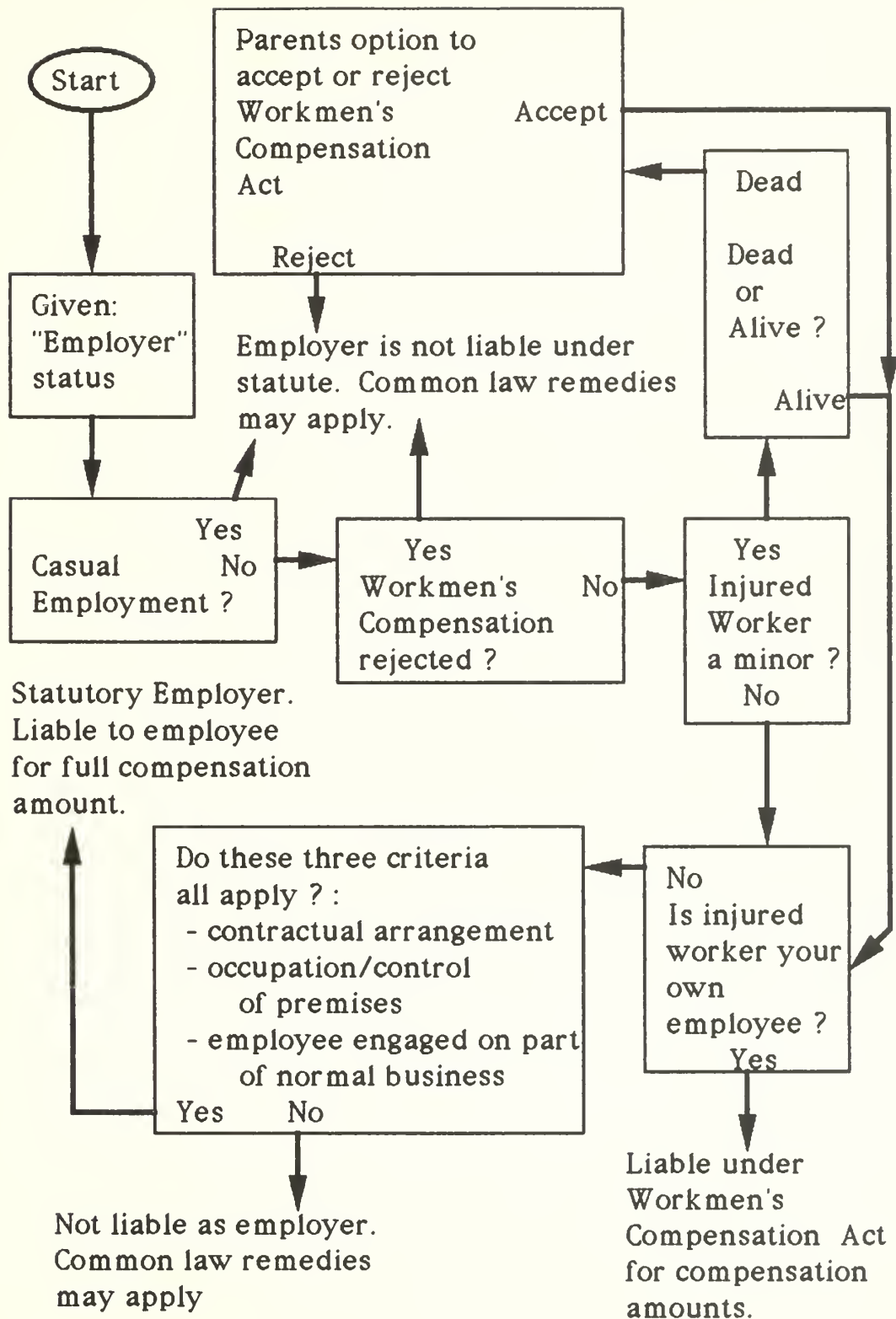


Figure 2. Employer Liability Model



compensation for injuries to employees arising in the course of their employment" 1915 P.L. 1103.

The current statute in force is the Pennsylvania Workmen's Compensation Act, Act No. 281, 1939 P.L. 520, with its various reenactments and amendments. The original act was first passed on June 2, 1915, as Act No. 338, 1915 P.L. 736. It was amended June 3rd, 1915 and again on April 7, 1921. The original act was repealed when a new act was signed on June 4, 1937. The new act was not well received, however, and the original 1915 act was reenacted, along with the repeal of the 1937 act, on June 21, 1939, 1939 P.L. 520.

### The Intention of the Workmen's Compensation Act

The intention of the act is to impose liability without regard for fault, in order to keep the mitigation of loss due to personal injury out of the adversarial relationship and delayed resolution situation which is common in tort actions. By virtue of assigning the liability to the employer, the act also attempts to make the financial burden of restitution for injury a part of the cost of doing business. Stated in *Rudy v. McCloskey & Co.*, 35 A.2d 250, 348 Pa. 401, 1944, "...purpose of the (act) is to provide recompense commensurate with the damage from accidental injury, as a fair exchange for relinquishing every other right of action against the employer."

The key item is the concept of the exchange. The individual held liable under the act is shielded from further actions on the part of the injured party. The effect is to make the employer shoulder the burden of liability without regard to fault. This intent is evident even from the short



title: "An Act defining the liability of an employer for injuries received by an employee in the course of employment."

### Examination of the Workmen's Compensation Act

This chapter examines some provisions of the act, specifically those that pertain to the extent of the liability of the employer. The employer, as it pertains to the construction industry and this thesis, will most often be the contractor. The question of when the public owner is or is not the employer is treated in chapter 4.

### Limitations of the Workmen's Compensation Act

Several limitations apply that reduce the burden on the employer and balance the effects of the act. One of the most important limitations is that the injury must be accidental. In *Shatto v. Bardinet Exports*, 84 A.2d 388, 170 Pa.Super. 16, 1951, a watchman, with snow-shoveling duties, suffered a heart attack. He was performing the work in accordance with his duties at the time of the heart attack. He sued for workmen's compensation. A lower court found in his favor but the decision was reversed on appeal. The final ruling was based on the requirement that the "courts must recognize that it is an act limited to providing compensation for accidental injuries." There was insufficient evidence to prove that the heart attack was a work related accident.





## Contravention of Common Law

Additionally, several cases have noted that workmen's compensation statutes are in derogation or contravention of common law and therefore must be strictly construed. This was tested in *Stevenson v. Westmoreland Coal Co.*, 146 Pa.Super. 32, 21 A.2d 468, 1941, where an injured worker waited too long to access his benefits and the court ruled in favor of the employer. Otherwise the law becomes too powerful a tool against the employer, who is without the normal protective and balancing mechanisms provided in common law. This concept, which becomes more important in the distinction between employer and third party, is covered in more detail in Chapter 4.

For the purposes of the employer, the liberal construction limitation is such that liberality in construction of the statute in favor of the employee is not intended to fabricate liability for the employer that does not really exist. As stated in *Kransky v. Glen Alden Coal Co.* 47 A.2d 645, 354 Pa. 425, 1946, "That the Workmen's Compensation Act is to be liberally construed in favor of injured employees ... killed while at work does not warrant the imposition of a legal liability thereunder for which no just basis in law exists." However for the employee who is injured there is no doubt that the statute is to be interpreted, construed and/or constructed liberally so as to insure the favorable resolution for the injured employee intended by the drafters of the legislation.

Because of the contravention of common law inherent in the statute, it was a given assumption that it would be tested on constitutional grounds. These tests failed to dislodge the Act. As quoted from a brief which



addressed this subject, filed in 1939 by Attorney General Bard, " No provision of any compensation act ever passed in Pennsylvania has ever been held unconstitutional and the basic validity of this act was upheld in *Anderson v. Carnegie Steel Corp.*, 255 Pa. 33," *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 1939.

The referenced *Anderson v. Carnegie Steel Corp.* case actually stated, "The (Workmen's Compensation Act) ... does not effect a deprivation of property without the due process of law, in violation of Article I, Section 9 of the Constitution of Pennsylvania and the fourteenth Amendment to the Constitution of the United States."

In 1920, in *Qualp v. Stewart Co.*, 109 A. 780, 266 Pa. 502, the wording of the title of the act was deemed to be sufficient guidance with which to impose liability upon the prime contractor when the employee of a subcontractor was injured. This opened a whole specialized subclass involving subcontractors and their duty, or lack of it, as employers.

### The Employer as Insurer

Finally, the employer's liability should not be construed to be that of an insurer. In *Ginther v. J. P. Graham Transfer Co.*, 33 A.2d 923, 348 Pa. 60, 1943, the court found that, "Employer's liability for compensation is found only in the terms of Workmen's Compensation Act ... employer is not an "insurer" of life and health of his employees." This was reaffirmed in 1950, in *Cope v. Philadelphia Toilet Laundry & Supply Co.*, 74 A.2d 775, 167 Pa. Super. 205, which states, " While ... Act should be liberally construed, purpose of act is to compensate for accidental injuries and not to insure life



and health of employees." Note here the confirmation also of the "accidental" requirement and "liberal construction" inasmuch as it applies to employee benefits.

### Recovery Amounts Provided by the Act

The recovery amounts are specified in section 306(a) for full disability, basically 66 and 2/3% of wages, and in section 306(b) for partial disability, 66 and 2/3% of the difference between wages prior to the disability and subsequent earning power. The December 5, 1974 amendment to the Act, No. 263, P.L. 782, replaced prior wages with the terminology, "statewide average weekly wage." This average is established annually, by the Pennsylvania Unemployment Compensation law.

These amounts are capped by maximum weekly values. A minimum weekly floor is also provided. These cap and floor amounts are reviewed annually and occasionally adjusted as needed. For example, the maximum compensation payment, for full disability, was \$30.00 per week in 1952, 1952 P.L. 61. As of 1968 that amount was raised to \$52.50 for full disability. The partial disability remained at \$21.25 maximum per week. Minimum payment for a full disability was at \$20.00 during the same time frame, 1972 P.L. 159. The 1989 weekly maximum, for full disability was \$399.00 per week and the minimum was \$133.00 as quoted by the Bureau of Workmen's Compensation toll-free information service. The weekly maximum and minimum, projected by the same service, for 1990, were \$419.00 and \$139.67, respectively



Full disability payments continue for 700 weeks and partial disability payments continue for 350 weeks. Lower values apply if specific body parts are lost. For example, the compensation period for a hand is 175 weeks, a forearm is 195 weeks and an eye is 125 weeks. Additionally, if the injured employee has a dependent wife and/or children the compensation period varies in proportion to the number of dependents, 1974 P.L. 782.

It is evident that the act does not cure all the ills occasioned by an injury to the family's breadwinner. In fact, it is very likely that expenses will go up as a result of medically related bills, while income falls somewhat because of the language of the Act.

The exception would be the low skill-low pay worker, who may see an increase in actual income if he can be counted as injured. In the region of Pennsylvania where the author grew up, it was not uncommon for starting or relatively inexperienced mine workers to develop "back injuries" and collect money without working.

### Rejection of the Act

The employer's liability under the Act is actually somewhat voluntary. However, the act can not be unilaterally rejected. There must be a prior agreement, by both parties, in accordance with Section 302(a) of the 1915 Act, confirmed in section 1 of the 1939 Act.

Failing to make provision for such a prior agreement is held as sufficient cause to find that both parties have accepted the provisions of the act. This is stated in section 302 as follows, " It shall be presumed that the parties have accepted ... this act ... unless there be ... an express statement in





writing from either party to the other, that the provisions of this act are not intended to apply..." 1939 P.L. 520.

For the contractor, rejection of the act is tantamount to deciding that he wants to be held liable or blameless as decided by common law tort criteria. As noted in Figure 2, this has a major impact on the liability question. However, the Act further reinforces its own applicability with two very specific stipulations regarding the assumption of common law liability as opposed to the employer's liability provided for in the statute.

### Stipulations Limiting Rejection of the Act

The first of these stipulations comes from section 201 of the 1939 Act which states that three particular defenses were not available, in a common law action, to employers who had previously rejected the Workmen's Compensation Act. These three defenses, (1) negligence of a fellow employee, (2) employee assumed the risk when he "voluntarily" reported for work, and (3) employee satisfied "contributory negligence" by his own actions relating to the injury, had been a basis for employers limiting or eliminating their culpability under common law. By stripping these "unholy trinity" defenses, the Act made the employer's position, outside the Act, much more vulnerable.

The second stipulation was provided in the September 29, 1938 amendment to the 1937 Workmen's Compensation Act. This amendment provided that, "when injury results to an employee in the course of his employment it shall be presumed that the employer's negligence caused said injury, which presumption may be rebutted by the employer," 1938 P.L. 52.



These stipulations make it very risky for an employer to reject the Act even though the employer has a right to do so. His vulnerability to losing a tort action is much greater than normal in such cases and he must start out, in each instance, with the burden of proving himself non-negligent in a situation where it is already assumed that he is negligent.

### Exclusiveness of Remedy

The important balancing portion of the act is the exclusiveness of remedy available to the employee against the employer. This is the portion of the act that prohibits further action against the employer after the adjudication of liability. This means that the employee can not gain additional compensation with a tort action against the employer.

### The Strategy of Exclusiveness of Remedy

There are 2 important strategy considerations. First, the employer who has made appropriate arrangements with the company finances or with an insurance carrier, can be assured of the maximum liability that will be faced in the event of an accident. The employer is "untouchable" beyond that point. Secondly, by extension of the fact that only the employer is covered in this balancing act, the loss of "employer" status and subsequent findings of culpable negligence could lead to a much higher financial liability than would be imposed upon the employer under the act.

Therefore, if the owner believes that there will be injuries on the site and that there is a possibility of liability because of conduct during the



construction process, then the employer role is likely to be the least risky. If, however, the owner feels that either (1) there will be no injuries on the site or (2) that there can be no after the fact connection establishing contributory negligence, then the automatic liability of the employer status would be an unnecessary burden.

Interestingly, the reason "don't expect any injuries on site" is not as ludicrous as it might first sound. Often a short term subcontractor will respond in exactly that way and attempt to conduct affairs so that the prime contractor is the employer. If the owner is wrong and there is an injury, then the owner would be potentially liable for third party actions (see Chapter 3). However, some subcontractors have tried to reverse their field following an injury and cut their losses with a late assumption of employer status. This option's attractiveness has been reduced by the rulings in both *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.* 404 Pa. 53, 171 A.2d 185, 1961, and *Steets v. Sovereign Construction Co.* 413 Pa. 458, 198 A.2d 590, 1964. Both of these cases reiterated that " employer who permits the entry ... of a laborer ... hired by ... a contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that contractor, shall be conclusively presumed to have agreed to pay to such laborer ... compensation ...". This language is essentially a restatement of part of Section 203 of the act itself and will lead to statutory employer considerations, which are covered later.

Exclusiveness has been tested in several cases. A principal one involves the Philadelphia shipyard where the land is actually federally occupied rather than being state land per se. In this case, *Capetola v. Barclay White Co.* 139 F.2d 556, 1944, it was pointed out that federal statute



empowered states to apply workmen's compensation to lands "therein owned by the United States" and more importantly that the Pennsylvania statute "furnished exclusive remedy" and therefore tort action for negligence was not maintainable by Capetola.

This finding reaches into the area of jurisdictional disputes and further reinforces the idea that there is one employer and that the employer status, once bestowed, is both a requirement to accept liability under the act and a shield against assumption of any further liability. This remains true regardless of how confused the lines of authority may be as regards land ownership or governmental jurisdiction. For the act to apply it is only necessary for the site to be contained within the Commonwealth's borders. By extension, land ownership by a public entity or township would not circumvent the normal operation and application of the act.

Cases have also been tried that involved the thought that the employer, when clearly negligent, should not be allowed to hide behind the Workmen's Compensation Act and thereby limit his exposure to liability. However, these attempts have uniformly and consistently failed. In *Welsch v. Pittsburgh Terminal Coal Corporation*, 154 A. 716, 303 Pa. 405, 1931, the court held that the employee (already established as subject to the Act) "could not recover for injury in action for trespass..." (the term trespass here indicates a subgrouping of tort actions) "...though accident resulted from employer's neglect of statutory duty." This point of law was extended in *Snyder v. I Unterberg & Co.* 57 York 92, 1942, to include surviving dependants, limiting their recourse against the employer to only what would have been available to the injured worker under the act.





Lastly, the negligence of a fellow employee cannot be traced back to the employer through the use of agency, circumventing the employer's limited liability and thereby opening him up to tort action. This is succinctly stated in *Stern v. Philadelphia Rapid Transit Co.* 17 D.& C. 665, 1932, as "Action ... may not be maintained against plaintiff's employer on ground of negligence of fellow employee, exclusive remedy being provided by act."

Agency, to the extent that the employer is liable under the Act for the actions of all his employees, is implied in this opinion. Before applying that agency concept however, it remains necessary to satisfy both the "accidental" and "normal course of business" tests to the incident since failing either of these could place the accident outside the boundaries of the Act.

### The Statutory Employer

In a situation where an owner lets a contract to a contractor who then subcontracts all or part of the work awarded to him, there arises an area of confusion over who is actually the employer. These cases may involve work subcontracted by the original subcontractors to additional subcontractors. The issue revolves around each affected member from the owner to the sub-subcontractor attempting to have the minimum possible financial burden. Because of the potentially large sums of money involved, personal financial interests tend to overcome objective assessments of who is the employer. The statutes and subsequent case law decisions have attempted to resolve this issue. In this process they have created and confirmed the concept of the statutory employer.



## The Scope of the Discussion

In the discussion of the statutory employer we will limit ourselves in this chapter to the liability that the statutory employer is exposed to and to the definition of statutory employer as it is defined by the relationship between contractors/subcontractors. The question of when the owner becomes the statutory employer is deferred until Chapter 4. However, it should be noted that in those cases where statutory employer status is conferred upon the owner, the following effects would still apply.

### Identification of the Statutory Employer

The basis for the identification of the statutory employer is found in the previously cited *Qualp v. James Stewart Co.* case. This case, which actually predated some others that have since become more often quoted, formed the foundation for future representations of the identity of the statutory employer.

A subcontractor engaged via contract by James Stewart Co., to perform a portion of the work, engaged a sub-sub-contractor whose employee was subsequently killed on the job. The court affirmed the prime contractor as the intended statutory employer by stating the intent of the statutes as follows, "The legislature wanted to definitely fix some responsible party with the obligation of paying compensation to injured workmen, and the party selected was the first whose duty it was to assume control of the work. It selected the first in succession from the owner, believing the owner would contract with none but responsible persons. He was the first in the field and



in the contracting scheme of work, the head of the endeavor, the person to whom an employee would naturally look. ... The act intended to throw the burden on the man who secured the original contract from the owner to the end that employees of any degree doing work thereunder might always be protected in compensation claims." Therefore, the court laid the basis for determinations that the prime contractor was uniquely entitled to the employer status among all the contractors that were working on a site.

The Qualp v. James Stewart case also addressed the extension question of the status of subcontractors from their perspective. Again, interpreting the language of the statute the court states, " ...the term "contractor" as used in ...section 203 and ... section 302... shall include a subcontractor to whom a principle contractor has sublet any part of the work which the principle contractor has undertaken." This extended the interpretation above by deleting the subcontractor from consideration of employer status.

The court went on to define some of the relationship of subcontractors to their own employees by quoting from section 302 of the Act as follows, "...the latter clause of section 302 (b), which reads, " It shall not be in effect between the intermediate employer or contractor and such laborer or assistant, unless otherwise expressly agreed," indicates legislative intention to hold the original contractor for compensation liability to the employees of at least a second contractor." The court found against James Stewart Co. on the appeal and thus extended the statutory employer role to the third subcontractor which effectively declared that it covered additional subcontractors as well



## Challenge to the Interpretation

This would appear to be such a sufficiently strong and clear decision that it would not be challenged. However, it was challenged and some of the reason may lie in the actual language chosen for section 203 of the Act. Partially quoted below, it reads, " An employer, who permits the entry, upon premises occupied by him or under his control, of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employee" 1939 P.L. 1103.

This raises two questions. First, if the employer and contractor are different, then is the owner the employer? That question will be treated in detail in Chapter 4. Second, if the employer is not the owner, is the employer then the contractor? And if so, which one(s) in the case of subcontractors? *Qualp v. James Stewart* tackled part of this issue but the decision was not clear enough to avoid further tests.

These questions led to one of the landmark cases concerning workmen's compensation in Pennsylvania, *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 153 A. 424, 1930 . Continuing the interpretation of *Qualp v. James Stewart*, but with considerably more attention to detail, the court defined "employer" as the principal contractor and "contractor", on his premises, as subcontractor. The court held that Section 105 modified "contractor" in section 203, so as to exclude a contractor engaged in an independent business, or an independent contractor, but to include a subcontractor to whom the principal contractor has sublet a part of the work.





The court continued the interpretation stating, "Contractors" as used in section 105 is synonymous with "subcontractors" although subcontractors are still regarded as independent contractors under certain conditions."

This interpretation was used in an application to section 203, of the 1915 Act, where this court made a rather famous and oft-quoted determination. The court "rewrote" the section as follows, "As properly understood, section 203 would read: "an employer ( principle contractor) who permits the entry upon premises occupied by him or under his control of a laborer.....hired by.....a contractor ( subcontractor), for the performance upon such premises of a part of the employer's (principle contractor's) regular business entrusted to .....such contractor ( subcontractor), shall be liable in the same manner..... as to his own employee" (the "dots" are directly from the text of the case). Consequently, this established that the principal contractor is supposed to be the statutory employer. This is true almost all the time. However, we shall see in Chapter 4 that the owner can become the statutory employer in some circumstances.

More recently, (1961 and 1964) this construction of the statutory language was retested and upheld in both the previously mentioned cases of *Pittsburgh Steel Co. v. Patterson-Emerson Comstock* and *Steets v. Sovereign Construction Co.*

### Prerequisites: The 3-Criteria Test

Despite the obvious focus of intent established by the courts in the decisions above, several prerequisites apply that must be satisfied before the statutory employer label may be applied. First, there must be a



contractual relationship. Second, there must also be "occupation and control of premises". Thirdly, the employee must be engaged on part of the employer's normal business. These 3 criteria form a major part of the basis of determining who is liable. This effect can be seen, presented in graphical form, in Figure 2.

### The Original 5 Criteria

Though these 3 criteria are well established, as noted below, their basis is found in a set of 5 criteria that were first listed in the McDonald v. Levinson Steel Co. case. The court held that the following 5 criteria were necessary to create statutory employer status: (1) An employer who is under contract with an owner or one in the position of the owner; (2) Premises occupied by or under the control of such employer; (3) A subcontract made by such employer; (4) Part of the employer's normal business entrusted to such subcontractor; and (5) An employee of such subcontractor. This court found that the subcontractor relationship must be present. As discussed below, other courts have accepted less specific contractual relationships in it's place.

### The 3-Criteria Test Expanded

The following section details each of the 3 criteria. These criteria are then carried forward to Chapter 4 where they are applied as part of the basis for determining when the owner is the employer and when he is a third party.



### Criterion 1: Contractual Relationship

The contractual relationship requirement is straightforward. Although an implied contract is sufficient under certain circumstances, the majority of the cases show that there is usually a written document available. This is especially true in the construction industry with the one exception being those cases that satisfy casual employment. Casual employment will be covered later in this chapter.

A specific employment contract or subcontract is not always required. In *Pittsburgh Steel v. Patterson-Emerson-Comstock*, Patterson contracted Eichealy to perform the contract. Eichealy hired the subsequently injured employee. Patterson was held to be the statutory employer. Therefore it is enough that the relationship exists. However, it should be noted that in the 1927 case of *Gallivan v. Wark Co.* 136 A. 223, 288 Pa. 443, it was recorded that, "This provision making contractor statutory employer of employee of subcontractor cannot be extended further than necessary to accomplish purpose."

### Criterion 2: Occupation of the Premises

Occupation of the premises turns out to be both crucial and not quite as simple as it first appears to be. The occupation includes being there physically and also includes simply having the premises under control. In the 1943 case of *Davis v. Philadelphia* 153 Super.Ct. 645, 35 A.2d 77, Davis was moving machinery for an auction company that would be selling it later.



The company was not the operator of the mine but was effectively in control of it for the purposes of removing the machinery it wanted. In this case, control alone was sufficient. Operation and control together were not required.

In the case of *Lee v. McMinn Industries* 76 A.2d 493, 167 Pa.Super 501, 1951, the prime contractor held contracts for resurfacing of various road surfaces and subcontracted each local area individually. One subcontractor who held two of the individual subcontracts had an employee injured during the transit of his roller from one site to the other. But the court held that the prime contractor had not included the intervening distance as part of the premises and in fact let each area out individually so that he was not liable as a statutory employer.

The concept of premises or control is so important it overshadows implied contract and agency. In *D'Alessandro v. Barfield*, 35 A.2d 412, 348 Pa. 328, 1944, a boy engaged by the driver of a milk truck fell off the truck and was injured. The boy was helping to deliver milk, without the consent, knowledge or authorization of the dairy firm and away from the premises of the dairy firm, where the dairy firm did not exercise control. The dairy firm was held not to be a statutory employer.

### Criterion 3: In the Normal Course of Business

Thirdly, there must work performed by the employee that is a part of the regular business of the contractor to whom you wish to apply the label of statutory employer. This is the area of some of the most interesting determinations and, as will be seen in chapter 4, is one of the areas that can





be applied to circumvent an owner's normal defenses from liability as the employer.

The previously mentioned *Davis v. City of Philadelphia* states, "... who permits ... the performance upon such premises of part of the principal contractor's regular business entrusted to such contractor ... is liable for compensation to such laborer in the same manner as to his own employees." *Qualp v. James Stewart Co.* states, " This work was a part of the employer's regular business, made so by his contract with the owner." Both cases show that it is necessary for the injured employee to be engaged in the principal's normal business if the principal is to be named as statutory employer.

Being engaged in other than the normal business of the proposed statutory employer is sufficient cause to deny that relationship, even when on the premises. This is shown by the case of *Allen v. Babcock & Wilcox Tube Co.* 52 A.2d 314, 356 Pa. 414, 1947. The employee who was hired by the contractor, who was hired by the Babcock and Wilcox Co., a manufacturer of steel, was injured during excavation work required of the contractor. Babcock and Wilcox was held not liable as a statutory employer because the excavation work was not part of the normal course of business of making steel.

This same principle is seen in *McGrath v. Pennsylvania Sugar Co.* 282 Pa. 265, 127 A. 780, 1920 where the court made a distinction between loading operations and processing operations. It is also shown by *Stipanovich v. Westinghouse Electric Corp.* 210 Super.Ct. 98, 231 A.2d 894, 1967 in which the court ruled that it was optional, not obligatory, for Westinghouse to have contracted the work, which caused the injury, at that time. Therefore it wasn't normal business.



### Avoidance of Statutory Employer Responsibility

The statutory employer responsibility of the prime contractor can be avoided, with respect to subcontractors. *Qualp v. James Stewart Co.* stated, "This responsibility may be avoided, but it must be done in the way pointed out by the act, and of this the employee must have notice. No unfair dealing can thus arise."

The act identifies the same provision and means that are offered for direct employer-employee relationships regarding rejection of the act (covered above). The same limitations and penalties also apply. However, in common practice, it is frequently a part of a subcontractor's contract that the subcontractor must assume the employer role for workmen's compensation purposes. If the subcontractor complies there is no problem. If the subcontractor fails, then statutory employer status would be invoked and third party lawsuits would be likely, also.

### Incidental Employment

Incidental employment is another limitation to the employer's liability under the Act. Its importance in determining the result of a liability question can be easily seen in Figure 2.

Two criteria determine that an incidental employment was not covered by the Act. The first is that it be casual in nature. The second criterion is that the employment occur outside the regular course of the employer's business. This is established in *Yahnert v. Logan Coal Co.*, 129



Pa.Super 528, 195 A. 450, 1938, and *Smith v. Philadelphia & Reading Coal & Iron Co.* 86 Super.Ct. 136, 1925.

### Casual Employment

Employment is defined as casual when it is occasional, irregular, incidental, came about by chance or is not for a fixed duration of time. These principles are upheld in the following three cases: *Ronan v. Cornelia E. Eddy Estate*, 136 Pa.Super 436, 7 A.2d 534, 1939, *Cochran v. William Penn Hotel*, 140 Pa.Super 323, 13 A.2d 875, 1940, and *Dobrich v. Pittsburgh Terminal Coal Corporation*, 145 Pa.Super 87, 20 A.2d 898 1941.

However, employment as a carpenter doing odd carpentry jobs on several stores was ruled as "not casual" in *Thomas v. Bache* 351 Pa. 220, 40 A.2d 495, 1945. Concurrently, doing all of a given class of work offered by an employer, even though those services are intermittent was ruled as "not casual" in *Miller v. Farmer's National Bank*, 152 Pa.Super 405, 33 A.2d 646, 1943.

### Outside the Regular Course of Business

Along with being casual, the work must also be outside the regular course of business for the exclusion to apply. As defined in *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546, 1939, the regular course of business refers to, " ...the experience and custom in conduct of business as is of usual, if not daily, occurrence and observation." This is similar to the



term "normal course of business" used in determinations of statutory employer responsibility.

In *Snavely v. Redemptorist Fathers*, 151 Pa.Super 625, 30 A.2d 724, 1943, the court stated that in the, " phrase "not in the regular course of business of the employer", the word "regular" modified "course" and not "business", and the question was whether an employment was in the regular course of the employer's business and not whether the employment was in the course of the employer's regular business." This differentiation only appears in this case. For statutory employer considerations the terms "normal course" and "normal business" appear to be interchangeable. However, the inference may be drawn that this could change if tested.

It can be seen that this criterion is treated subjectively by the courts. The "regular course of business" is open to interpretation in most cases. However, the concept is important because it relates to the exclusion of an employer's liability in these cases.

### Volunteer Workers

Along with incidental employment status, there is the parallel category of "volunteer" workers. As with incidental employment, the employer, or the one who would be the employer, if it wasn't "volunteer work", is not liable for workmen's compensation. This was stated as early as 1919 in *Fekete v. Lehigh & Wilkes-Barre Coal Co.*, 71 Pa.Super 231 as follows, " A mere volunteer engaging in work not expected of him and not justified by any emergency is not an employee within this act." This principle was also later confirmed in *Holbrook v. City of Wilkes-Barre*, 309





Pa. 586, 164 A. 719, 1933, which stated, " Mere doing of work without authority of person for whom it is done is not sufficient to entitle injured person to compensation." However, as noted in Chapter 3, wherever the Workmen's Compensation Act does not apply, tort options will always remain.

### Injuries to Employed Minors

Minors are a potential special category. However, in the case of the Workmen's Compensation Act they are covered the same as any other worker. This allows the minor to recover for injuries sustained, assuming that the same proper conditions apply for employee status as for those of an adult worker. It also allows the employer to avoid a tort action for trespass brought by the parents of the minor, since exclusiveness of remedy applies. This was tested in both *Santucci v. Frank* 356 Pa. 54, 51 A.2d 696, 1947 and *Zeitz v. Zurich General Accident & Liability Insurance Co.*, 165 Super.Ct. 295, 67 A.2d 742, 1949.

One particular side note that causes a significant impact in the employer's liability should also be mentioned . This special case issue applies only to the case of a minor, fatally injured, in a situation where the parents were unaware of the employment (see Figure 2). It is applicable only to the employer. In this instance the parents may elect to give notice of their intention to reject the Act, as if they had been aware of the employment, and then proceed with a tort action against the employer. Thus, the parental permission, or lack of it, can assume a value of thousands of dollars.



### Summary

The employer's liability is strictly defined by the Workmen's Compensation Act. The employer is required to accept the liability defined by the Act. However, the employer is protected from all additional liability, including common law tort actions, by the doctrine of exclusiveness of remedy. Furthermore, the Act caps the weekly amount payable to the injured employee and this amount is less than paying an employee for 40 hours work at the minimum wage.

If subcontractors are involved, a three criteria test may be applied to identify someone other than the injured worker's immediate employer as the "employer" for workmen's compensation purposes. If this occurs, the term "statutory employer" is used to designate the party that becomes responsible for compensation. This is usually, but not always, the prime contractor.

Employer status and statutory status are both open to limited redefinition in the contract documents. The Workmen's Compensation Act provisions can even be rejected, if the parties agree, by following notice provisions set forth in the Act. However, the common law tort liability is considerably greater than the liability imposed by the Act and these options are not usually pursued. If both parties fail to act, the Act is automatically in force.

Lastly, the Act does not cover incidental employment. However, the Act does cover employment of a minor, just as if the minor had been an adult, except in the case where the the parents were unaware of the



employment and the minor was killed. In that special circumstance the parents may elect either the provisions of the Act or the privilege of pursuing a tort action.



## Chapter 3

### LIABILITY OF THE OWNER AS A THIRD PARTY

#### Introduction

In the determination of construction contract injury liability the owner is usually assumed to occupy a "third-party" position. This is the position of neither employer nor employee. This chapter examines the liability of this position. Variations where the third party assumption is not always valid are addressed in Chapters 2 and 4.

Third parties can include suppliers, manufacturers, co-workers and contractees, which includes owners. For the purposes of this chapter the owner's occupation of third party status as the contractee of a construction project is all that will be examined. Other types of third party actions are beyond the scope of this thesis.

#### Third Party Status

Third parties can be sued in tort actions. This is upheld in common law. This does not need to be proven here. However, because of its clarity, a Pennsylvania test case, *Howard v. Berg*, 86 D.& C. 358, 1954, is worthy of note. It confirms the application in Pennsylvania by stating, " The Workmen's Compensation Act does not affect the existing common law right to sue the wrongdoer, unless that wrongdoer is the master." The rules of application, of that principle, in the cases where insurer's or employer's





rights under the workmen's compensation statutes have come into play, are not so well known.

Third party liability is not capped like the workmen's compensation awards discussed in Chapter 2. It may include "pain and suffering" and "punitive damages," both of which can raise the level of financial loss to many times the actual costs of the injury and its treatment. The high cost of these awards makes tort liability potentially more damaging than paying workmen's compensation. The balancing factor is that all tort actions (except those settled out of court, by the parties themselves) must submit to examination of their merits by trial in a courtroom. There is no automatic determination of award structure as in the Workmen's Compensation Act.

Unlike the topics of Chapters 2 and 4, the testing of third party liability rules is not as well documented in "Pennsylvania specific" cases. Accordingly, the author has drawn from cases throughout the country that illustrate the principles in this chapter. Where the author found Pennsylvania cases that have tested the principle, they are referenced in preference to the others.

### The Owner's Opponents in Tort Actions

The owner's vulnerability to legal action following a construction injury, is inextricably related to the identities of the possible litigants who may oppose him. Each litigant brings a slightly different scenario to the case and the owner's possible responses vary accordingly.

Briefly the opponent of the owner in a tort action may be one of three parties. They are:



- (1) The injured employee, or his estate.
- (2) The employer (this assumes that "employer status" is not in question).
- (3) The employer's insurance company.

These three opponents and a flow chart of their rights of action against a third party owner are shown in Figure 3. Note that subrogation (which can be thought of as the right of a party, to the award pursued by another party) and indemnification, shown in Figure 3, are covered later in this chapter.

Figure 4 shows the application of these same principles, in a more detailed fashion, specifically tailored to usage in Pennsylvania. Both Figures 3 and 4 may be referred to throughout the remainder of this chapter.

### The Employee

The injured employee's ability to recover against the owner is based on two points. First, there must be negligence on the part of the owner and second, there must be additional reasons sufficient for recovery (including punitive damages and pain and suffering) not yet covered by workmen's compensation. This is encouraged in Pennsylvania by the language of the compensation schedules. It practically guarantees that if some provable negligence is present there will be a cause of action for the employee (see the "employee" line in Figure 3).

The "excess amounts" criteria is the author's interpretation of the case law. It is based in considerable part on the recurring points of law in



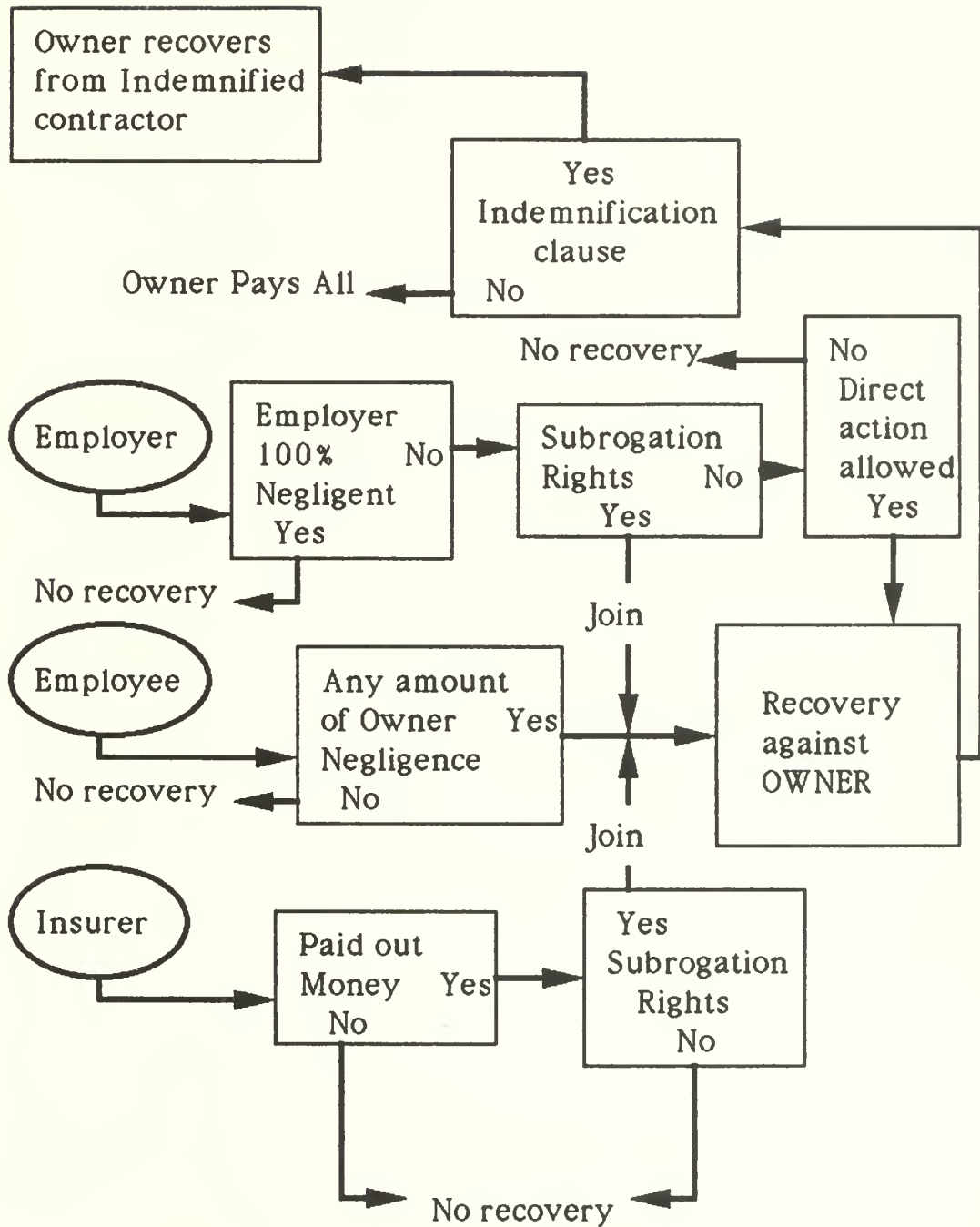


Figure 3. General Third Party Liability Model



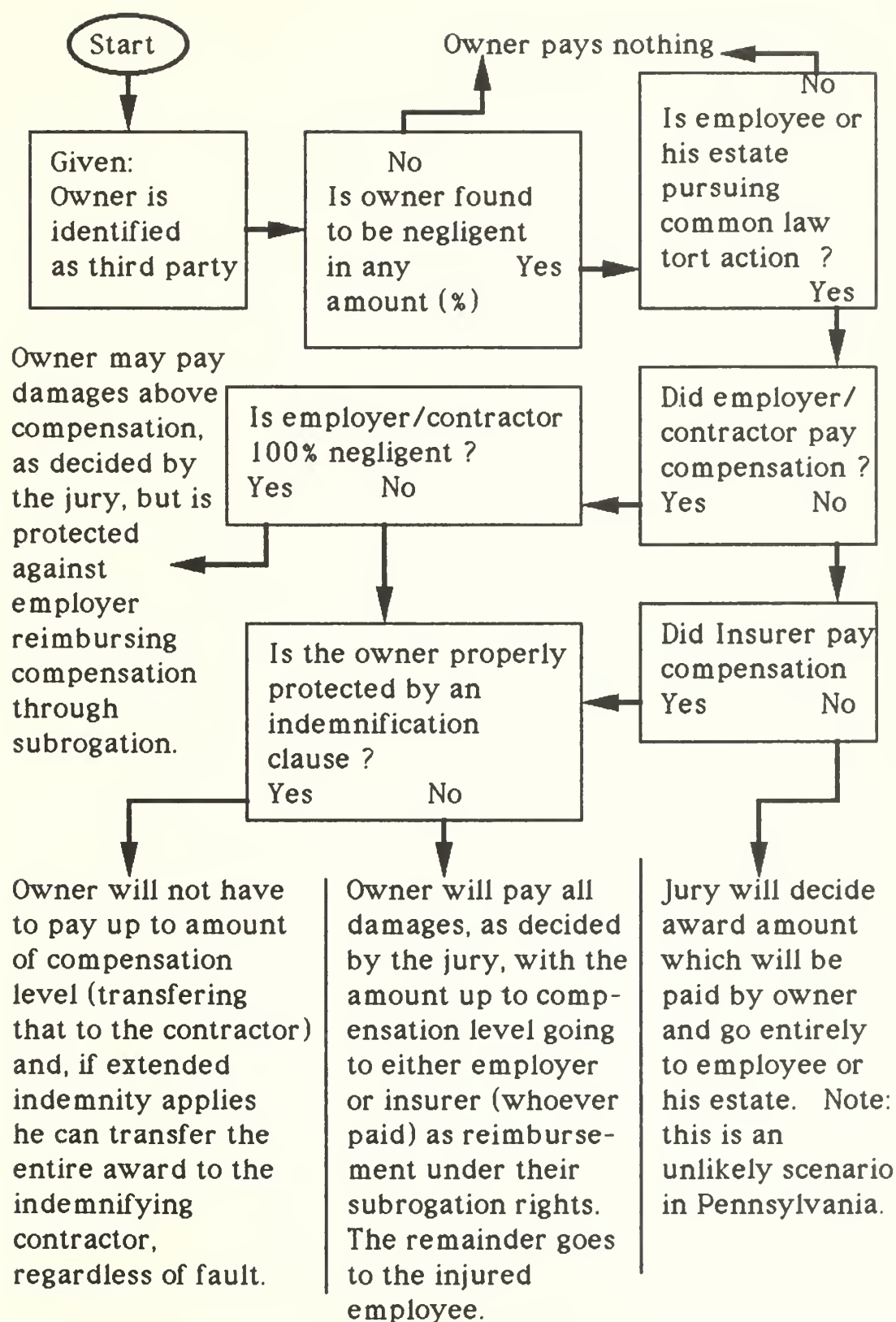


Figure 4. Pennsylvania Third Party Liability Flowchart





subrogation cases (covered later in this chapter) and the lack of any Pennsylvania case law that indicates a contrary interpretation, in the cases reviewed. However, it must be noted that this is not the universal opinion. In *Murphy v. Holman* 176 S.E. 5, 1934, a Georgia court found that, "... a petition alleging that the plaintiff's employee was killed by reason of the defendant's negligence ... was held to state a cause of action."

### The Pennsylvania Employee

The negligence requirement, in Pennsylvania case law, as well as additional confirmation of the right to tort action by an employee, is found in the recent case of *Whirley Industries, Inc. v. Segel*, 462 A.2d 800, 316 Pa.Super 75, 1983. The court states, "...where an employee's injuries are the result of negligence by a third party, the employee may bring an action against the third party." Note that, as shown in Figure 4, this is voluntary. If the employee does not proceed a third party owner will end up paying nothing.

### The Least Limiting Criterion

While the above discussion clearly relates the current stance of recent case law, there is historical precedent for a far less limiting criterion being applied to the question of the employee's right to sue. This less limiting criterion can be thought of as the principle of "If the compensation doesn't cover it, then you can sue." This is shown in *Boal v. Electric Storage Battery Co.*, 98 F.2d 815, 1938, which states, "An employee's remedy under the



Workmen's Compensation Act of Pennsylvania is exclusive, but where not entitled to recover thereunder the employee may sue in tort."

This principle is a simple statement of sufficient conditions for initiation of a tort action. Although not exactly in line with criteria established in more recent decisions, nothing in those decisions has specifically ruled out the applicability of this approach. It appears it could be used.

### Lack of Limits on Amounts

Of special importance is the amount that may be recovered. In Pennsylvania, negligence is not necessarily in equitable proportion to the amount sought in tort. Thus in *Jones v. Carborundum Co.*, 515 F.Supp 559, 1981, we find, " Under Pennsylvania law, if employer's negligence amounted to 90% and third party's negligence was only 10%, injured employee would nevertheless be entitled to collect his full damages from the third-party tortfeasor." This principle is noted in both Figures 3 and 4, by "any amount of owner negligence" and "owner found to be negligent in any amount" respectively.

As a modification to the above it should be noted that the option to settle out of court does exist for employee verses third party lawsuits. Case law verification of the application of that privilege to construction accidents can be found in cases such as *Employers' Liability Assur. Corp. v. Eaby*, 111 Pa.Super 589, 170 A. 532, 1934, where an insurance company went after a portion of the out of court settlement. The insurance company, incidentally, was denied.



### The Employer

The employer may also have a claim against the third party. The process of resolution varies from state to state.

In Maryland, in *Storrs v. Mech*, 170 A. 743, 1934, a self insuring employer, who had paid compensation, " was entitled to be reimbursed by maintaining an action against the tort-feasor causing the employee's death, the court rejecting the contention that the employer could not recover." Also, in New York, "an employer who had paid compensation ... was held entitled to bring an action for reimbursement from the third person whose negligence caused the employee's death," *Coleman v. Cating Rope Works*, 286 N.Y.S. 315, 1936. The viability of this combination varies from state to state. In Figure 3, the author charts the process first with subrogation and then with a check of direct action. This is because the author found no evidence that direct action ever has precedence over subrogation whenever a subrogation right exists.

In an appeal of *Storrs v. Mech* above, *Mech v. Storrs*, 179 A. 525, 1935, it was held that the employer, "was not limited by the amount of the award of compensation ... but might recover the full amount to which the deceased's dependant was entitled...". But in Washington, in *State v. Starr*, 52 P.2d 897, 1935, this is reversed and we find, "could not recover more than the amount of the compensation award,". Finally in Georgia, in *Western U. Teleg. Co. v. Smith*, 178 S.E. 472, 1935, the court determined that, " an employer who had paid compensation for injuries resulting from the



negligence of a third person should be subrogated to the right of the employee...".

### Pennsylvania Specific Cases

The Pennsylvania pattern is similar to the Georgia case. The employer can recover his costs of compensation paid, but only through subrogation and not as a result of direct action against the third party (note the difference between Figure 4 and Figure 3).

These principles are supported by several cases. The basic right to recovery is found in *Myers v. Commercial Union Assur. Companies*, 319 Pa.Super 21, 465 A.2d 1032, 1982, and *Wiest v. Eazor Exp., Inc.*, 311 Pa.Super 128, 457 A.2d 527, 1982, which both contain the statement, " If an employer's liability is occasioned by fault of a third party, employer may pursue its subrogation rights under Workmen's Compensation Act."

*Whirley Industries, Inc. v. Segel*, previously cited in the section on employee rights, also contains the employer's subrogation right but includes the stipulation that it exists, " ...so long as it can show that it was compelled to make payments to the employee by reason of the negligence of the third party." This appears to be unnecessary common sense but actually refers to situations where payments were never made or settlements occurred out of court and then the stipulation would limit the employer's recovery.

In similar vein, is the statement, " ...if the employer is 100% negligent, he loses the benefit of his right to subrogation." quoted from *Jones v. Carborundum*, 515 F.Supp 559, 1981, regarding third party suits initiated in the name of the employee and subsequent employer rights to





reimbursement. Note that from the owner's perspective, the payment in a judgement rendered against him would not be affected unless, of course, the owner was not negligent, in which case he could avoid the compensation award amount as well as other damages.

The employer's lack of cause of action to pursue separate tort against the third party is found in *Erie Castings Co. v. Grinding Supply, Inc.* 736 F.2d 99, 1984, which states, " Employer has no common law right of action for indemnity or contribution against alleged third-party tort-feasor; worker's compensation statutes provide exclusive remedy, and employer must proceed in action brought on behalf of the injured employee." Therefore, in Pennsylvania, the owner can expect one action, in the name of the employee, with the employer's interest joined in that action if he thinks the owner may have been negligent and he can recover his compensation claim.

In Figure 3 the above point is shown with a separate block. Note in Figure 4, however, that this is assumed since there is no other possibility in Pennsylvania.

### Comparative Negligence

An extremely important point is the concept of comparative negligence. This concept states that the payment would be apportioned to the parties as a function of their relative negligence in the cause of the accident. It is important because that concept does not apply in Pennsylvania. In the previously mentioned *Jones v. Carborundum Co.* case it states, " ...employer is entitled to recoup in full the entire amount of compensation available, even if the third party's negligence is less than the



employer's negligence." This is similar to the employee's rights noted above and serves together with them to make the owner potentially liable for all the costs and damages of the injury if he is even just slightly negligent with regard to that injury.

### Points in the Owner's Favor

Despite the foregoing discussion, case law is not completely against the third party owner. Two minor points in the owner's favor are also represented in the existing case law.

First, the third party is not liable for any increase in the employer's insurance rates following the injury, even if it is determined that the third party caused the injury. Stated in *Erie Castings v. Grinding Supply Co.*, "Third Party causing injury to employee is not liable under Pennsylvania law to employer for increase in insurance premiums attributable to employee's worker's compensation claim." Secondly, as confirmed in *Conrad v. Aero-Mayflower Transit Co.*, 152 Pa.Super 477, 33 A.2d 91, 1943, "there is no provision for the expenses of an attorney or trial costs...".

### The Insurer

The rights of the insurer are more limited than those of the employer. Separate action is often denied and recovery or reimbursement is frequently limited to subrogation. However, from the owner standpoint this still means that an unsuccessful defense will leave the owner paying the full amount of the damages, including the compensation.



## General Cases

Verifying the right to reimbursement of the insurer in other states are: (1) *Staples v. Central Surety & Ins. Corp.*, 62 F.2d 650, 1932 (in Oklahoma), (2) *Scheno Trucking Co. v. Bickford*, 174 A. 548, 1934 (in New Jersey), (3) *Liberty Mutual Ins. Co. v. Mueller*, 278 N.Y.S. 140, 1935 (in New York) and (4) *Traveler's Ins. Co. v. Georgia Power Co.*, 181 S.E. 111, and *Travelers Ins. Co. v. Bumstead*, 186 S.E. 742, 1936, both from Georgia.

In both of the two Georgia cases, *Traveler's Ins. Co. v. Georgia Power Co.* and *Travelor's Ins. Co. v. Bumstead*, as well as the New York case, *Liberty Mutual Ins. Co. v. Mueller*, the courts stated that there was no right available to the insurance companies that would allow them to proceed, seeking reimbursement, with independent actions of their own against the third party. This is shown graphically in Figure 3.

However, differences between the states exist. In Massachusetts, the case of *Bresnahan v. Barre*, 190 N.E. 815, 1934, concerned a third party and the rights of an insurer who has already paid compensation. The court stated that the insurer, "might enforce the liability of such person." Even more specifically, prosecution of an action (separate) is allowed as a question for resolution of the court in *Murray v. Rossmeisal*, 187 N.E. 622, 1933.

Note in Figure 3, no independent course of action block is shown. Even in the Massachusetts case it is not clear that this exists. The exact vehicle to be used for enforcement is not specified, while in *Murray v. Rossmeisal* the question is given to the jury.



### Pennsylvania Specific Cases

In Pennsylvania, the insurer, like the employer has no right of action by itself but does have a statutory right to reimbursement under subrogation. The court stated in *Employers Mut. Liability Ins. Co. of Wis. v. Melcher*, 378 Pa. 598, 107 A.2d 874, 1954, "Where ... insurer was required to pay compensation ..., insurer was entitled to be subrogated to ... right of payment". Whoever pays the claim, either the employer or the insurer is entitled to reimbursement based on subrogation.

Finally, in the previously mentioned *Moltz v. Sherwood Bros.*, the insurance company that paid the compensation tried to recover reimbursement, based on subrogation, after the employee recovered a judgement against a liable third party. The court ruled against the insurer stating that they were too late in trying to join the action and that having failed to look after their interests properly, they were out of options because they had no right to pursue a separate action of their own.

### Subrogation

As noted above, subrogation is the vehicle of reimbursement for insurers in Oklahoma, New Jersey, New York and Georgia. It can end up being more than the simple amount required for reimbursement. In California, an employer recovered the entire amount of a judgement awarded the employee, including excess above the amount paid as compensation, by entitlement to a lien on the recovery, *Dighton v. Martin*, 41 P.2d 197, 1935.





In Texas, subrogation also works for the insurer, even when the insurer declined the option to pursue the cause of action against the third party. The insurer's subrogation privilege allows recovery of paid compensation from the proceedings of the award to the estate of the deceased employee in the suit which the insurer previously declined to initiate. A case in point, for reference, is *Houston Gas & Fuel Co. v. Perry*, 91 S.W.2d 1052, 1936.

### Pennsylvania Specific Cases

In Pennsylvania, the employer or the insurance carrier can receive reimbursement, for compensation paid, through the vehicle of subrogation, if they join an action brought by the employee or his estate against the third party. Stated in *Moltz v. Sherwood Bros.* 116 Pa.Super 231, 176 A. 842, 1935, " ...an employer's right of subrogation against a third party alleged to be liable for an employee's injury must be worked out through an action brought in the name of the injured employee,...".

Stating the Pennsylvania perspective on subrogation most clearly and at the same time covering both employer and insurer rights to it, is the very recent case of *Reliance Ins. Co. v. Richmond Machine Co.*, 309 Pa.Super 430, 455 A.2d 686, 1983. This case states that, " for employer or it's insurer to enforce its subrogation rights against alleged third party tort-feasors responsible for injuries to employee, it must proceed in action brought on behalf of employee in order to determine liability of third party to employee and if such liability is determined, then employer's insurer may recover, out of an award to injured employee the amount that has been paid in worker's



compensation benefits." Note that this case also states the need to join an action already launched in the name of the injured employee (see Figure 3).

One possible complication of the subrogation process is the potential for double payouts being required of the third party as a result of the several claimants to that money. In Pennsylvania this is covered by the necessity of the employer and insurer joining the employee's action and their inability to initiate actions of their own against the third party. *Heckendorn v. Consolidated Rail Corp.*, 502 Pa. 101, 465 A.2d 609, 1983, states, "Negligent third party is liable to injured employee for full amount of any judgement, and there is no possibility that injured employee will recover amount in excess of his damages, since where compensable injury is caused by act of third party, employer who has paid worker's compensation benefits is subrogated to right of employee against such third party."

Therefore, the bottom line is that if the employee proceeds with an action against the third party and the third party is the least bit negligent, it can expect to pay the entire amount, compensation included, once the employer or insurer (whoever initially paid the compensation) joins the action in pursuit of reimbursement (see Figure 4).

However, if the employee takes his compensation money without initiating an action then, in Pennsylvania at least, the third party is not vulnerable. Neither the employer or insurer can pursue their own actions against him. But since the Pennsylvania employee is not subject to election (see below), the only negative inducements acting on his decision to proceed with tort action are the attorney fees and the time it takes. This leaves the third party owner rather vulnerable but there is one more crucial ingredient



in the equation, indemnification, covered at the end of this chapter, which can help reduce the owner's risk.

### Election

Election is a term that sometimes appears in reference to third party suits connected with workmen's compensation issues. A brief discussion of this concept is included here for clarity.

Election appears in the cases from both Washington (State v. Starr) and Oklahoma (Staples v. Central Surety & Ins. Corp.) previously cited in this chapter. It was further found, by the author, in the Oklahoma case of Keener Oil & Gas Co. v. Bushong, 56 P.2d 819, 1936.

In both of these states, election is a statutory provision that forces the injured employee party to decide to either accept compensation or waive compensation and pursue a common law action against an allegedly negligent third party.

This procedure does exist in the two states mentioned above and may exist in others. However, no mention of election was observed in any of the cases from other states referenced in this work and it is specifically not in force in Pennsylvania. It is not treated further in this thesis.

### Negligence

In the preceding discussions, it can be seen that negligence is a required element of common law liability. It was also shown that Pennsylvania law allows the interpretation of any negligence, no matter how



small, on the part of a third party, to be sufficient for judgement against that third party for the entire amount of the damages.

The owner will usually be cast in the role of a third party (for exceptions see chapter 4) and his liability will therefore hinge on determinations of negligence. As stated in *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 153 A. 424, 1930, "the owner of the premises may be subject to a common-law action for any negligence on his part which was the proximate cause of the workman's injuries." This makes the definition of negligence vitally important to the owner.

### Defining Negligence

Unfortunately, there is no definition of negligence that is as clean and workable as most of the other points considered in this thesis. Negligence has a common law foundation, not a statutory one. Negligence is often given over to the jury to be decided as part of their deliberations. It does not function as a simple point of law. Resolving questions of negligence is characterized in the often cited, *Conway v. O'Brien*, 11 F.2d 611, 1940, "For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied."

Negligence relies upon an interpretation of "what the reasonable man should have done". This is highly subjective and can include further subjective interpretations of what was foreseeable and what was a reasonable assumption of risk. Again from *Conway v. O'Brien*, "The degree





of care demanded of a person by an occasion is the resultant of three factors: The likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate..."

It is not the purpose of this work to try and define negligence in the same detail the author has applied elsewhere. No such definition is possible, given the current state of case law. However, some authors of legal works have given the negligence issue a limited structure and a condensation of a few of their ideas, along with a selection of examples, is included here because of the importance of this issue.

### The Three Categories of Negligence

Negligence can occur in a host of areas. This paper will define negligence as falling into one of three categories. The categories are (1) active or primary, (2) passive or vicarious and (3) ratification. These categories were originally suggested by Branch (1988, p. 20) but can be found in similar form in Simon (1989, pp. 45-57) and Sweet (1985, pp. 100-124, 817-834). Both Sweet and Simon break active negligence down into several other categories of their own. All three treatments differ from each other in this regard. Additionally, only Branch confers separate status on ratification .



### Category 1: Active Negligence

The active negligence category appears to have the greatest breadth. It is composed of negligence in selecting a contractor, negligence in providing proper sites and materials and negligence in either exercising or retaining control over the conduct of the work.

Negligence in selection of a contractor is probably the least likely to be a problem. It should be noted, though, that incompetence in a contractor can leave an owner liable for injuries to the work men, if the owner was aware of the contractors negligence, *Peck v. Womack*, 192 P.2d 874, 1948.

Negligence in providing either the site or materials or tools can become a trap for the owner. As soon as the owner provides anything he has assumed some liability for its function, and consequently for related injuries. The case which seems to be the foundation for this principle occurred before the turn of the century and involved a worker injured by an owner provided crane, *Johnson v. Spear*, 42 N.W. 1092, 1898. A recent (1984) example in Tennessee held the owner liable for injuries to a contractor's employee from a fall off an owner supplied ladder that didn't meet OSHA standards, *Teal v. E.I. duPont de Nemours & Co.*, 728 F.2d 799, 1984.

Negligence in control is perhaps the most visible concern. The use of contract inspectors and administrators begs the question of how much attention becomes control. The answer is still the same, negligence goes to the jury. However, several cases were found that review owner control in other states and while there are some exceptions (like *Emberton v. State Farm Mutual Automobile Insurance Co.*, 358 N.E.2d 1254, 1976, where the



owner was liable for control because of input to the drafting of plans and subsequent inspection efforts) most of the cases did not go against the owner. Some examples of cases where owner negligence due to control was tried and failed are: *Jones v. City of Logansport*, 436 N.E.2d 1138, 1982 (Indiana), *Williams v. Gervais F. Favrot Co.*, 499 So.2d 623, 1987 (Louisiana), which stated that, "owner's periodic inspection did not create an exercise of control by the owner...", and *Van Ness v. Independent Construction Co.* 392 So.2d 1017, 1981 (Florida).

### Category 2: Vicarious Negligence

The passive or vicarious negligence category is one that is applied without regard to fault. While it can include some other types of problems, such as illegal work and public nuisance, it is generally a factor in construction with regard to "ultrahazardous" or "inherently dangerous" work. There are cases on record, including *Williams v. Gervais F. Favrot*, cited above, that define construction work, per se, as not ultrahazardous or inherently dangerous. However, there are other cases, involving construction that captured one label or the other due to the nature of the specific tasks being performed. There is no positive answer at the present time. Branch (1988, p. 39) states, "Whether the work being done is, in fact, inherently dangerous is a fact question for the jury." That continues to affirm the previously stated conclusion that the negligence question will be decided by a jury rather than by the precedent that exists to date.



### Category 3: Negligence by Ratification

Finally, ratification is a form of negligence which the owner should treat with a good deal of respect. Recognizing that control of the job is unwise the owner may still attempt to have some kind of approval authority. In *Herman v. City of Buffalo*, 108 N.E. 452, 1915, an engineer of the city (the owner) approved the laying of a foundation that subsequently was revealed as the cause of the building's collapse during construction. The court held against the city (in 1913) that the city (as owner) was liable. The appeals case cited above overturned the decision, on technical grounds relating to instructions to the jury, not on the correctness of the owner's liability due to negligence. Again, the owner can be liable and the question of negligence will be decided by the jury.

### Tort Reform

Sweet (1985, pp. 831-833) suggests that tort liability has grown beyond its proper place in the legal system. He expresses the feeling that it has eclipsed workmen's compensation and suggests some possible reforms, even pointing out attempts made by several states. Tort reform of this type has not occurred in Pennsylvania. Opinion remains divided on the advisability of limiting tort availability to victims and the owner should not expect any major revisions in the near future.





## Owner's Guide

The owner desiring to limit his exposure to liability for negligence should examine his own operation in light of the categories mentioned here and may wish to consider the "Owner's Five Point Guide to Basic Negligence", detailed on Figure 5, which includes a short format for ease of memory. The reader should recognize that the author is not a lawyer and this guide is the result of an academic exercise only. It is not sufficient to base a court defense on, although it may provide a starting place or help in conceptualization.

### OSHA as a Private Cause of Action

One of the persistent questions raised during the course of this research effort was the apparent uncertainty of whether allowing OSHA violations on a site put the owner in jeopardy of an increased liability. This was especially interesting during the site investigation phase of the project where OSHA regulations were used as the standard for the determination of the subjective safety of the four construction sites during daily operations.

It turned out that this has been tested several times, although not in Pennsylvania, and the current case law has strongly concluded that OSHA violations do not increase an owner's liability and can not be used as a cause of action in a tort proceeding.

The cases that have tested this include a paralyzing fall from improper scaffolding, *Jeter v. St. Regis Paper Co.* 507 F.2d 973, 1975, and two instances of crushing, one injurious and one fatal, due to improper trench shoring,



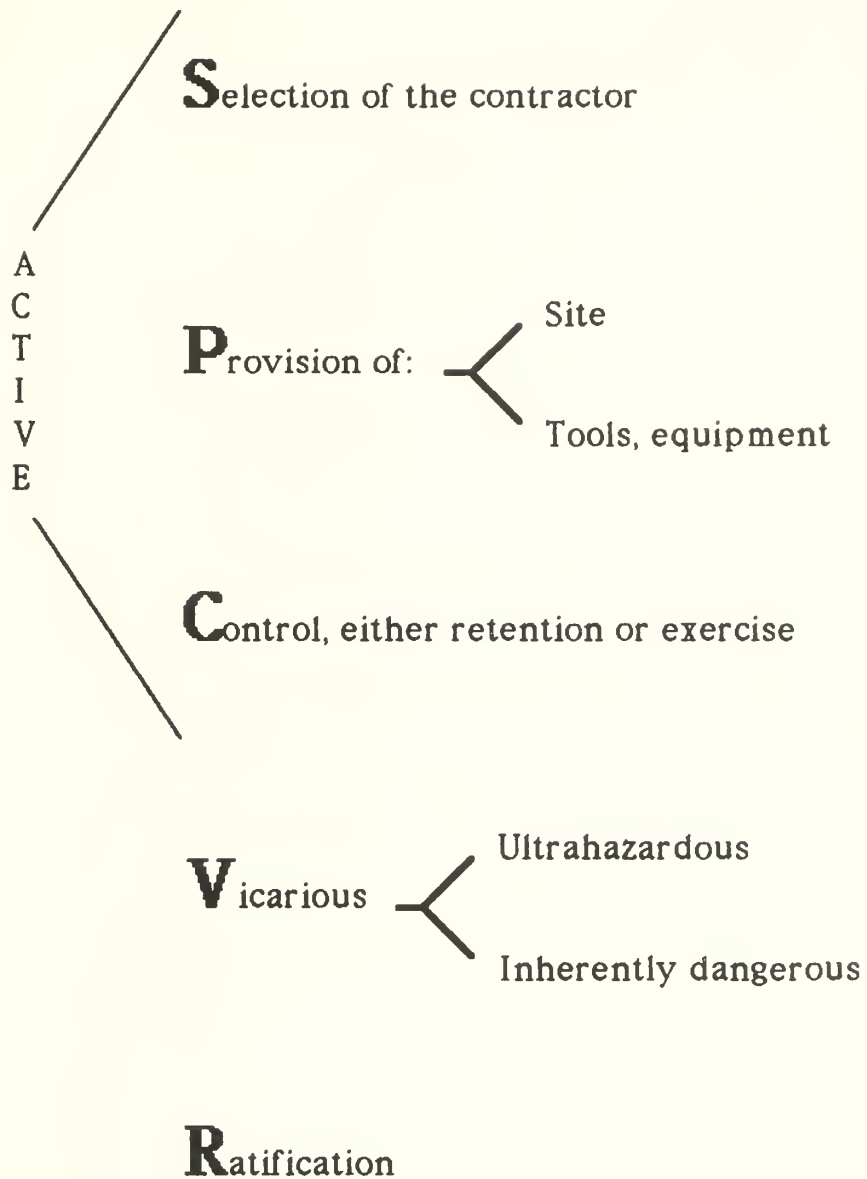


Figure 5. Owner's Five-Point Guide to Basic Negligence



Russel v. Bartly, 494 F.2d 334, 1974, and Hare v. Federal Compress & Warehouse Co. 359 F.Supp 214, 1973.

In all these cases the idea that the OSHA violations might create a cause of action against the owner, or a duty on the owner's part, was specifically tested and rejected by the court. There were no instances of case law discovered by the author that countered or mitigated this principle even in the slightest part.

### Indemnity

The right of indemnity in the event of a third party action by the injured party against the owner is one of the more interesting legal machinations that can occur.

The owner does not necessarily have to absorb the entire penalty that may be imposed by an unfavorable decision in a third party action. This occurs when the owner can successfully join the contractor as employer to the third party suit as an additional defendant.

This would appear to be a contradiction of the workmen's compensation principle but under common law it has been upheld. However, a key element must be in place for this to occur.

There must be a duty on the part of the contractor to contribute to or to indemnify the owner. The best way to establish this duty is to find a clause in the contract that spells this out. It is common for an indemnity clause to be written in the contract. In fact, all the contracts that this author has had contact with, in his administration of federal contracts duties, have



had some form of indemnity clause that attempted to satisfy this key element.

### Indemnity Clauses

There has not been a single right way established to write an indemnity clause. Most indemnity clauses attempt to have the contractor "hold the owner blameless" and assume "all liability" so that the owner is safe from tort action. The idea is that an unfavorable verdict against the owner, as third party, will be paid for by the contractor, under the indemnification clause. The advantages, to the owner, in the event of a subrogation claim for compensation reimbursement are obvious. Historically, the clauses have functioned mostly as a way to avoid the payment of the compensation (as from a subrogated tort action) and not as a general cure-all type of shield, against all liability (however, see the following section).

One example of the way these clauses are worded is found in the AIA document A201, General Conditions of the Contract for Construction, Article 4.18 (Sweet 1985, p. 925). This particular format indicates that "the Contractor shall indemnify and hold harmless the Owner ... from and against all claims, damages, losses and expenses, ... regardless of whether or not it is caused in part by a party indemnified hereunder." That last part means "even if it's the owner's fault".

This kind of clause appears unfair but it is the only real protection against the owner absorbing liability for compensation payments through subrogated employer's or insurer's claims. A sort of backhanded proof of it's





validity is available, in Pennsylvania case law, in the case of *Ledford v. Central Medical Pavilion Inc.* 90 F.R.D. 445. The court states, "...employer shall not be liable to third party for damages, contribution or indemnity in any action at law or otherwise except by contract."

This is admittedly, not conclusive, but it does suggest that by contract, the employer could be held to indemnify the owner. While the author did not find any additional test cases that served to further clarify this, it should be recognized that the indemnity clause is included, in current contracts, for exactly this purpose.

### Extended Indemnity

The foregoing discussion on indemnity may be undergoing some change. While not yet tested in Pennsylvania, several recent decisions point to an expanded liability on the part of the employer.

As previously noted, the majority of the decisions indicated that if the contractor signs a contract agreeing to "indemnify and hold the owner harmless," this carried over into an assumption of third party liability that may be found against the owner. However, the employer's liability was still limited to the maximums listed in the workmen's compensation statutes.

In *O'Neill v. United States* 276 F. Supp 724, 1967, and later *Fisher v. United States* 299 F. Supp 1, 1969, this principle underwent some change. Both cases validated the new concept that the Workmen's Compensation Act was only effective for the employer-employee relationship and therefore did not limit liability for third party negligence of the owner transferred to the contractor by a valid indemnity clause.



This makes the indemnity clause an increasingly powerful tool for the owner. Most contractors are still not fully aware of the broad interpretation of the clause. It may look like a clause that says the contractor will not sue the owner and it's role in divesting the owner of financial loss, in the event of his own negligence, while transferring responsibility for payment to the contractor, is likely to be an unpleasant surprise. From the perspective of the owner, however, it should be understood that the indemnity clause is protection against the particularly undesirable effects of the far-reaching subrogation principle.

### Summary

This chapter focused on the liability of the owner in a "third party" role. The third party status allows the owner to be sued in a common law tort action. The owner's opponents may be the injured employee, the employee's estate, the employer or the insurance company. In all these cases, the owner does not enjoy any protection that may limit the dollar value of the liability.

If the owner is negligent, even just partially, Pennsylvania law allows the party that paid compensation to attempt to recover that amount through subrogation. This is in addition to the amount the owner may have to pay to the employee in excess of compensation levels.

The owner's best defense is to avoid actions that will create the possibility of being negligent. This is not completely possible but the risk can be minimized.



The owner's other defense is to incorporate a properly written indemnity clause into the contract. The indemnity clause will force the contractor to assume the financial liability for compensation amounts in the event of subrogation. Additionally, extended liability, that transfers the complete financial burden, has been successfully defended in federal courts. However, extended liability has not been tested in Pennsylvania.

Finally, OSHA violations do not form a private cause of action and do not create an additional duty on the owner's part.



## Chapter 4

### DEFINING THE OWNER AS EITHER THE EMPLOYER OR AS A THIRD PARTY

#### Introduction

In this chapter the distinction between third party and employer status for the owner will be investigated. If the owner is clearly one or the other in all cases then the problem is simplified. The owner can plan financially for the eventuality of an injury on the jobsite with full knowledge of the expected liability. Additionally, the owner can prepare to meet the proper safety responsibilities. It is shown that while a definitive trend does exist in Pennsylvania this is not so clear nationwide.

However, even in Pennsylvania where the wording of the statutes has been interpreted rather uniformly, the owner's actions can still reverse the normal result. The actions that cause reversal are also discussed since an owner attempting to avoid unwarranted liability must remain aware of these possibilities. It is also shown, by extension, that a less scrupulous owner could conceivably reduce or eliminate the liability that rightfully should be accepted..

#### Owner-Employer Definitions Nationwide

The question of when the owner is the employer and when the owner is in a third party status is not clear when cases are taken indiscriminately





from across the United States. Each state has passed it's own set of workmen's compensation or similar statutes and these statutes are not uniform in either language or application.

The duty owed by the landowner to a "business invitee" is usually defined as the owner's responsibility (as seen in Chapter 3) but this duty can also be given to the prime contractor, as in *Delgado v. W. C. Garcia & Assoc.*, 27 Cal. Rptr 613, 1963, thus reducing the owner's liability and defining the contractor as the employer. If a provision for this effect is not in a given state's statutes, then the owner, by virtue of land ownership, may be the "employer" because of the responsibility to provide for the safe workplace. However, this duty is not conclusive of employer status and may be a duty owed as a third party, as in *Gordon v. Matson*, 439 S.W.2d 627, 1969, where the subcontractor, under Arkansas statute, was liable for failing to provide the safe workplace.

Retained control was already shown as an area where the owner could be found liable for negligence. Neither Branch (1988) nor Sweet (1985) specifically link negligence to the workmen's compensation statutes in any of the states they use as examples. This could lead to an interpretation that it is unimportant in that regard.

### The Silence of the Reference Texts

In the preceding sections it was shown that the liability of the employer as defined by Pennsylvania's Workmen's Compensation Act was quite different than the liability attached to a third party, which is established on relatively common principles throughout the United States.



Every reference text reviewed makes some mention of this difference in liability but the implication is that there is no question about the identity of the parties. The question of "when is the owner the employer" does not seem to be addressed. Yet it would make a potentially big difference, financially, if such an identity determination was open to the interpretation of the courts.

Additionally, there is an almost complete lack of information in the reference texts relating to the question of whether the owner is ever the employer. A review of general texts, including all general reference works listed in the bibliography of this paper will not produce many references to the employer vs. third party question.

### The Choice of a Single State Example

This situation would lead to a justifiable but flawed interpretation that the question is moot and not one of substance. Even then the circumstances would vary depending upon which state was considered.

Each state could be examined. But defining which states try the issue as a matter of substance and which ones do not is beyond the scope of this thesis. One state, Pennsylvania, is covered. It was determined that the issue is one of substance in Pennsylvania, the location chosen for the "laboratory example." It has been tried in court and various rules have arisen that can be used to predict, with some measure of success, which category is likely to apply to the owner in the aftermath of a construction injury.



Interpretation of Pennsylvania Workmen's  
Compensation Statutes

One important item that must be noted is the perspective given to use of the statutes. Briefly touched upon in Chapter 2, the rule is that the workmen's compensation laws conflict with the general flow of common law and therefore must be strictly construed, except for the liberal construction required to carry out the obvious purpose of helping the injured employee.

While at first seeming somewhat contradictory, this perspective is in fact a necessary adjunct to the principle of liberal construction mentioned in Chapter 2. In *Stevenson v. Westmoreland Coal Co.* 21 A.2d 468, 146 Pa.Super 32, 1941, it was held that, "Workmen's Compensation Act is in derogation of the common law and must be strictly construed within it's broad purpose." This was to prevent an employee from recovering damages for an injury received over 8 years previously when during that time he had taken no action to obtain compensation. Previously in *Zimmer v. Casey*, 146 A. 130, 296 Pa. 529, 1929, the court overturned a lower court ruling refusing to allow third party suits stating that, "As the Compensation Act is in derogation of the common law, it must receive a strict construction but not such as would in any way fetter it's humane purposes." This doctrine of strict construction outside the area of protecting the injured employee is required to prevent abuse. It has the affirmation of the state's Supreme Court. In follow-on appeal actions, *Stevenson v. Westmoreland* was heard by the Supreme Court and affirmed by citing the requirement for strict construction even when that measure may appear to be harsh, 26 A.2d 199, 344 Pa. 561, 1942.



### Categories Evident in Pennsylvania Case Law

Three broad categories that provide the foundation for the application of the law are evident. They are the 'Master-Servant Relationship', the 'Independent Contractor' and the 'Statutory Employer'. Each category is covered below, as are three additional special cases that are noteworthy subsets of the main categories. The law has developed different applications in each category but they all remain related in principle by their association with the Workmen's Compensation Statutes.

#### The Master-Servant Relationship

The master-servant relationship is crucial to the employer-employee status determination. Although it may at first appear that this is a broad definition of a relationship and therefore open to wide-ranging differences of interpretation, further inspection reveals that it is much stricter than that and open to interpretation only on rather narrow grounds.

The master-servant relationship developed from early common law tort actions and appears to have been included in the statutes because of the depth of precedent that exists concerning the definition. This allowed the legislators to include in the statute the full scope of the definition, already developed by case law, without the burden of redefining what they meant by "employer" themselves. It follows that this relationship must be addressed in the context of defining who is the employer.





First, the employer must occupy the role of master and the employee must occupy the role of servant. This is rather obvious but remains noteworthy for two reasons. Recognition of this fact is essential to satisfy completeness of the concept, and secondly, it is a defense to hold when one party truthfully functioned in the prescribed role and the other party did not. This is frequently the case with subcontractors.

The attendant question is when does a master-servant relationship exist? Also, are there some specific instances that can be identified and applied prior to court to assess the appropriate category for an owner? The answers are very closely related.

### The 4-Criteria Test

As noted in *Rich Hill Coal Co. v. Bashore* 334 Pa. 449, 7 A.2d 302, 1939, "The relation of master and servant exists where the employer has the right to select the employee, the power to remove and discharge him, and the right to direct both what work shall be done and the way and manner in which it shall be done." This is based on an earlier decision, *McColligan v. Pa. R. R. Co.* 214 Pa. 229, 63 A. 792, which quotes an almost identical passage referenced from the 20 Am Eng. Ency. of Law (2d ed.) (p. 11,12).

In *Cookson v. Knauff*, 157 Super.Ct. 401, 43 A.2d 402, 1945, citing *McColligan v. Pa R. R. Co.* and affirming *Rich Hill Coal Co. v. Bashore*, we find, "The master and servant relation exists where the employer has the right to select the employee, the power to discharge him, and the right to direct both what work shall be done and the way and manner in which it shall be done."



Additionally, *Cookson v. Knauff* states that, " The vital test in determining whether a workman is a servant of the person who engages him for the work is whether he is subject to the latter's control or right of control not only with regard to the work to be done but also with regard to the manner of performance."

These decisions provide four points that must all be satisfied if a master-servant and henceforth an employer-employee relationship is to exist. They are the basis for all determinations that the employer-employee relationship exists based on common law master-servant principles. Listing these particular points as the key points of law to be considered in establishing the master-servant relationship as it applies to the employer-employee relationship is also confirmed in several other cases including *Simonton v. Morton*, 275 Pa. 562, 119 A. 732, 1923, *Kelley v. D. L. & W. R. R. Co.*, 270 Pa. 426, 113 A. 419, 1921, and *Phipps v. Greensboro Gas Co.*, 109 Pa.Super 382, 1933 (*Phipps v. Greensboro Gas Co.* by exception, proving that without the satisfaction of these criteria an 'Independent Contractor' status exists instead). Each criteria is described below.

### The First Criterion of the 4-Criteria Test

The first criterion is the right to select an employee. Usually this is clearly the purview of whoever is signing the employee's paycheck. It gets muddled however from an owner's standpoint when professional qualifications of some or all workers can be reviewed by the owner as a contractual "protection." Even more interesting is the situation where the



owner specifies by contract clause a recommended list of subcontractors for specific parts of the project.

### The Second Criterion of the 4-Criteria Test

The master-servant relationship requires the criterion that the employer be empowered to remove and discharge employees. Again this is obviously a power held by the contractor who hired the worker. However, it is also a power that is sometimes reserved by the owner as a "protection" in case a specific worker becomes a problem on the site. This specific provision exists in all the larger federal contracts that the author has worked with. Additionally, blanket provisions allowing the owner to stop the work, such as section 3.3 of the standard AIA construction contract (document A101) (Sweet 1985, p. 923), have been challenged as satisfying this criterion by giving the owner the right to discharge all employees.

### The Third Criterion of the 4-Criteria Test

The employer satisfies the master-servant relationship by holding the right to direct what work shall be done. Note that direction is different than planning or preparing plans, but is closely related to scheduling when done at the micro level. This tends to suggest that there is an area of detailed scheduling that could be interpreted as directing what work shall be done. By extension it also serves to absolve the architect/engineer from consideration as an employer as long as he is not active on the site. Note that the employer status may accrue to the owner if his representative,



perhaps engineer or inspector, directs (details, schedules) the order of the work and thus satisfies this criteria, as the owner's agent.

#### The Fourth Criterion of the 4-Criteria Test

The fourth criterion is the right to direct the "way and manner" in which the work shall be done. This is similar to the third criterion but is separated from it by the element of time. Time is the key consideration of the third criteria, both as to the size of the unit considered and as to separation of the work from the moment of decision. In the fourth criteria time plays no role and method becomes the key element. Again it is understood that an architect/engineer prepared set of plans and specs exists and this criterion is addressing the application of those plans and specs to the project at hand. The method of achieving the results indicated on the plans must be open to variation or decision and the employer is specified as the individual or entity exercising the right to decide upon these methods.

#### Importance of the Third and Fourth Criteria

In *Berg v. Rosefsky* 202 Super.Ct. 598, 198 A.2d 334, 1964, the court reaffirmed that the third and fourth points were of somewhat more importance than the first two by the process of excluding the first two points, "The vital test in determining whether a workman is the servant of the person engaging him is whether he is subject to such person's control or right of control with regard to both the work done and the manner of performing it." This principle, similar to that quoted from *Cookson v. Knauff*





earlier, also appears in *Potash v. Bonaccorso* 179 Pa.Super 582, 117 A.2d 803, 1955, and *Felton v. Mellot* 165 Pa.Super 229, 67 A.2d 727, 1949.

While this is a pointed test in a rather recent decision, the body of case law indicates that all 4 criteria are important. That perspective is adhered to in this thesis. However, by virtue of the decision giving a relative ranking to the criteria, the foundation has been laid for a quantitative determination by a future court in a case where neither party satisfied all the criteria but each satisfied some of them. The judge could point to this precedent and rule that satisfaction of certain criteria carried more weight than satisfaction of others. The author did not find any case where this was tested.

### The Concept of "Rights"

Note in the above set of criteria that in three of the categories the word "right" appears. From these decisions it is very evident that in those three criteria there does not need to be any exercise of the function, per se, but only the right to do so if the individual so chooses. This is important. It is especially so when examining the second criteria which requires the "power" to discharge employees and again does not say anything about actually exercising this power. In effect, all four criteria rest on the documentation of the "right" to perform the various functions and do not require even a single performance of any function to be satisfied.

The best kind of evidence in a court room, that someone did have a right or power, would be to show that it was exercised. Common sense tells us this is true and it is convenient to presume that this would most likely be



the case. However it is not required, and an interesting corollary therefore surfaces. It is not a defense to merely show that one or more, or even all these criteria, went unexercised. Employer status may still apply if the 4 criteria simply existed as someone's right to exercise if they wanted to.

This has been tested in rather dramatic fashion in the case of *Fanning v. Apawana Golf Club*, 169 Super.Ct. 180, 82 A.2d 584, 1951. In this case a caddy, who received payment from the individual golfers, but was permitted, along with about a dozen other caddys, to operate routinely at the club, lost an eye to a golf ball. The club did not want to be held liable as the employer. The court (paraphrasing and editing from *Feller v. New Amsterdam Casualty Co.*, 363 Pa. 483, 70 A.2d 299) ruled that , " With regard to the power to direct the way and manner of doing the work, the question is not whether the employer actually exercised control, but whether he had the right to control." (emphasis added). Clearly this court identified the "right" as the key element. Other Pennsylvania cases affirming *Fanning v. Apawana Golf Club* include *McManus v. Kuhn* 194 Pa.Super 544, 168 A.2d 618, 1961 and *Stewart v. URYC* 237 Pa.Super 258, 352 A.2d 465, 1975.

### Summary of the 4-Criteria Test

While never specifically enumerated, the 4 functions appear to require satisfaction in all 4 parts to designate an individual as the employer by virtue of this master-servant relationship. Thus while two parties may find that they exercised control over one or more of the functions, currently it is not until all 4 criteria have been found to reside by right or power in



one individual or entity that the employer determination is satisfied (however, see also *Berg v. Rosefsky*, discussed previously).

This leaves us with the master-servant relationship as defined by 4 criteria which may be more succinctly defined as:

The Power/Right over:

1. Hiring
2. Firing
3. Timing of the work
4. Methodology of the work

This 4 phrase group captures the essence of the 4 criteria concept and keeps it simple. It is further detailed in Figure 6, which also shows the flow to the third party status determination. All 4 criteria must be satisfied. Once they are satisfied, then the employer is identified. No exercise of any or all of these functions is required for them to apply.

### The Independent Contractor

The law does recognize that there is a relationship identified as contractor-contractee. The contractee in this case being the one who let the contract. By extension this is the owner for the purposes of this thesis.

This relationship is presumably the one that is desired by both parties at the outset of a construction contract and if it is established as such, then there is little doubt about the division of roles between the owner and the contractor. The contractor becomes the employer and the owner becomes a third party contractee.



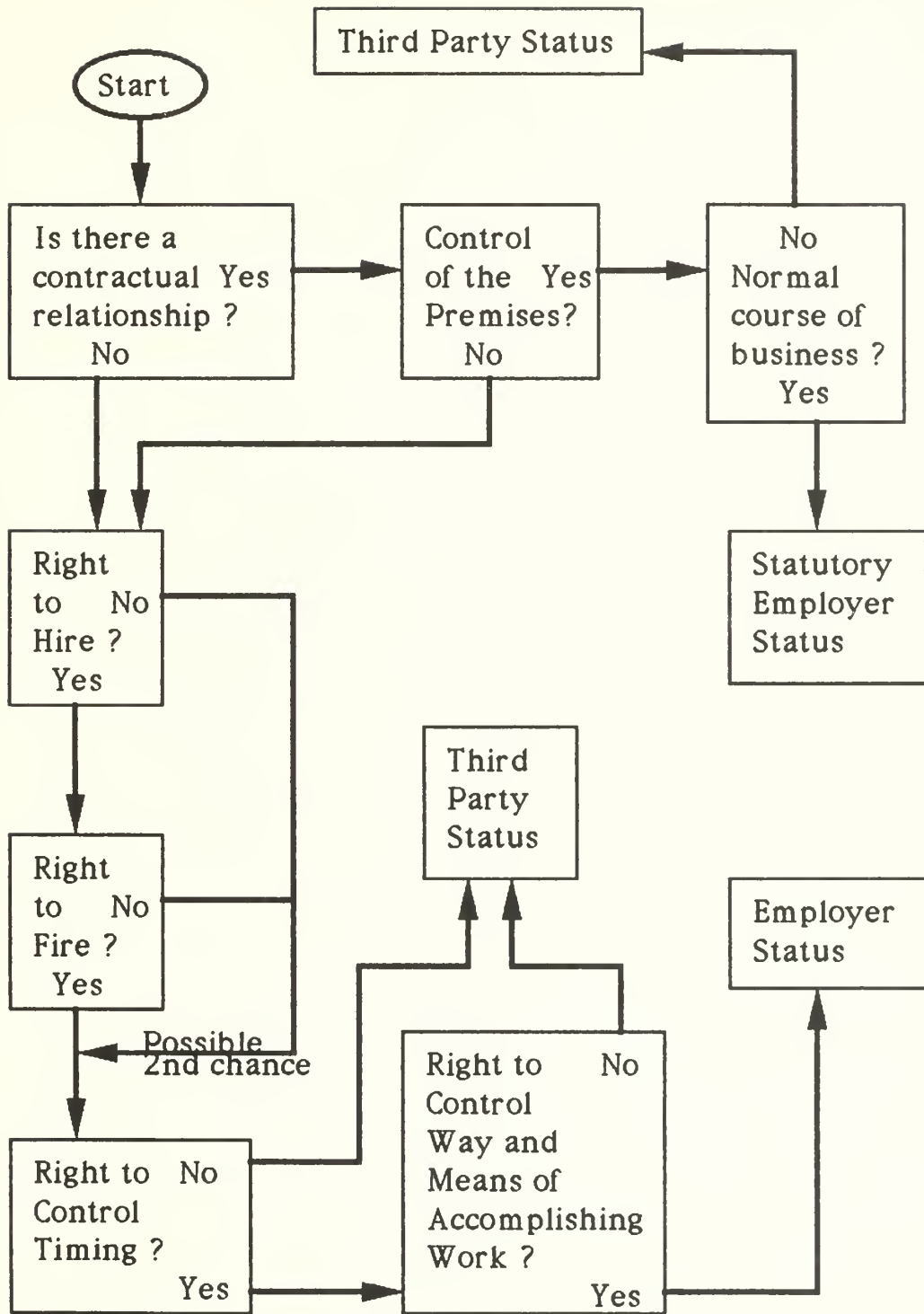


Figure 6. Determination of Owner Status as Employer or Third Party.





## Independent Contractor Status Tested

Rich Hill Coal Co. et al. v. Bashore , 334 Pa. 449, 7 A.2d 302, 1939 provides the following confirmation, "Where a contract is let for work to be done by another in which the contractee reserves no control over the means of it's accomplishment, but merely as to the result, the employment is an independent one establishing the relation of contractee and contractor, and not that of master and servant." Both the master-servant relationship and the normal contractor-contractee relationship were examined in this case. The court in Rich Hill Coal Co. held that the master-servant relationship did exist as identified by the above and forced the group of coal companies to accept the Workmen's Compensation Act. The case quoted and served to reaffirm the decision in Holbrook v. Wilkes-Barre, 309 Pa. 586, 164 A. 719, 1933, which also identified control over the means of accomplishment of the work as the salient feature in the decision.

In a similar case, more recently, a radio station hired a contractor and an employee of that contractor was injured moving some radio equipment around. While it did concern radio equipment, the contract was for the movement of the radio equipment and the radio station did not attempt to direct the manner or way the work was to be done other than to specify the final desired result in the contract. Therefore the court held that a contractor-contractee relationship existed between the radio station and the contractor, thus making the contractor liable as the employer for workmen's compensation. The court also ruled that because moving the radio equipment was not part of the normal business of the radio station, the station was also not a statutory employer and thus the contractor was an



independent contractor instead of being a sub-contractor who could look to the station as a prime, *Freeny v. William Penn Broadcasting Co.* 180 Super.Ct. 434, 118 A.2d 275, 1955.

### Degree of Control

It is not always easy to make this determination. This is the case even where the contracting parties have established a contractual relationship by language that specifically declares that the contractor is an independent contractor. In *Eggleston v. Leete* 186 Super.Ct. 542, 142 A.2d 777, 1958, a woodcutter under contract to a sawmill for a specified amount of wood, cut to specific lengths by type of tree, on land owned by that sawmill, and using a road cut by another contractor for that sawmill, but otherwise on his own by the conditions of the contract, was injured when a tree he had cut fell the wrong way. The sawmill wanted the woodcutter classified as an independent contractor, as the contract stipulated. The woodcutter felt he was an employee. The court stated that, "the designation given a claimant by an alleged employer is not conclusive as to whether he is an employee or an independent contractor...when a reasonable view of the evidence warrants finding that they were employees." The court found that, "there existed the right or authority to control in this case which tips the status scale to that of an employee." The most significant pieces of data were the requirement for specific dimensions, ownership of the land and the road used to haul the logs. These in aggregate established the proof of the right of control.



This principle is also found in the 1942 case of *Shields v. William Freihofer Baking Co.* which states, " Whatever one may be termed, the ultimate determination of the relationship depends on the degree of control in any given situation." The court found that a bakery goods distributor was an employee because he was engaged in the normal course of the bakery's business even though his relationship with the bakery was as a contracted distributor.

### Limitations to Contractual Language

The issue can not be forced just with contractual language, irrespective of the subsequent actions of the parties. This is important because it places the determination squarely back into the realm of the four criteria for master-servant or the three criteria for statutory employer (covered later in this chapter). The owner must be judicious in the writing of the contract and in subsequent actions. Post award actions that satisfy either set of "employer" criteria can overrule even the plain language of the contract.

Of special interest is the case of *Bogan v. Smoothway Construction Co.* 183 Super.Ct. 170, 130 A.2d 207, 1957. In this case a truck driver was killed during the unloading of his cargo, a water tank, as he helped the construction workers at the site lower the tank to the ground. The facts of the case clearly showed that the driver was an independent contractor who had been contracted to deliver the tank. The decision indicated that the driver was outside his contract responsibilities when he proceeded to help with the unloading of the tank after delivery. Because he helped at the



request of Smoothway construction's crane operator and was not in charge of the unloading but was in the same capacity as the usual crane operator's assistant, helping to steady the tank, the judge found that the four criteria establishing a master-servant relationship were satisfied. The construction company was liable for the compensation because the driver was killed while in their employ.

### Requirements for a Status Change

While not specifically addressed in the case, it is also interesting to note the short time span required to change from the status of independent contractor, to the status of employee. The actions of Smoothway quickly gave them the burden of assumption of liability in the case of injury. This lends strong credence to the wisdom of a supervisor who, sensing such an occurrence, and not desiring to assume that responsibility, acts to immediately stop the work in progress until it is properly sorted out. While less informed individuals may view this as overreacting, it clearly would have saved Smoothway some money if this had been done. By extension, the owner must be especially cognizant of his own actions, when on the site in an inspection capacity, as the assumption of employer status can occur quickly.

Over-ruling the plain language of the contract is rare in most types of legal disputes. This is presumably because the parties in question have truly stated their intent in the language of the contract. If this were not so then they would not have signed it. In the case of disputes over liability for injuries though, common law and workmen's compensation statutes (noted previously as generally being in contravention of common law principles)





compete for precedence and the large amounts of money potentially involved often encourage one party or the other to seek help from every possible twist of the law. Thus, when actions are not in accordance with the previously written contract, it is possible to rule in cases like *Eggelston v. Leete* that the real intent is determined by the actions of the parties or by their acceptance among both parties.

The owner in a construction contract must realize that change of status can occur, and is in fact likely to occur, if proper conditions are met. Therefore the owner must not feel that either "obvious intent" to merely contract or even specific language in his contract will be sufficient protection to avoid a status change. The owner must also remain cognizant of his actions and those of his agents (see below) that they do not become the basis for a determination of unexpected or unwanted employer status.

### Rental Equipment With Operators

Rental equipment that comes with operators forms a unique category that is often present in the construction environment. The rental equipment is on site by virtue of a contract with the vehicle's owner and the operator comes with it as an employee of the vehicle owner who pays the operator's salary. This appears to present a possible problem with the definitions that have been developed above. It has, however, already been tested and quite consistently forms a subset of the independent contractor set of rules described above.

The contractor-contractee relationship holds as long as the parties have not negated it by their actions. This is verified in both *O'Connell v.*



Roefaro 391 Pa. 52, 137 A.2d 325, 1958, and in *Mature v. Angelo* (which is cited in *O'Connell v. Roefaro*) 373 Pa. 593, 97 A.2d 59, 1953. The decisions state that merely designating the work that is to be done without specifying the method or manner of accomplishment does not establish control or an employer-employee relationship. The examples used include pointing out the location of holes to be dug, identifying a set of beams to be moved and hiring a taxi. These actions were held to not constitute the exercise of the right of specifying the way and manner of the work to be done. Therefore the operator remains as the employee of the vehicle owner and not the employee of the renter of the equipment.

This presumes the renter will brief the equipment operators once they are on site and not direct the "methods" used to accomplish the identified task(s). A question arises when considering the situation of the renter remaining to exercise more specific control over the rented equipment's operation.

### Role Reversal

The above situation has also been tested and has been found to be sufficient to reverse the roles and create for the equipment operator a status of employee of the renter and create for the equipment renter the status of employer. In *Ramondo v. Ramondo*, 169 Super.Ct. 102, 82 A.2d 40, 1951, the renter, a construction contractor, used the rented equipment (with their provided operators) along with his other equipment (some of which was owned but some of which was other rental equipment). There was no discernable difference in the eyes of the court with the methods of direction



used (Renter's superintendent or foreman told them "what we want done") between the various pieces of equipment. Therefore the construction contractor was found to have assumed employer status for all the operators of the rental equipment.

Even more convincing and in this instance involving a public municipality, is the case of *Doyle v. Commonwealth of Pennsylvania*, 153 Super.Ct. 611, 34 A.2d 812, 1943. The equipment was operated by a township and the township employed an operator for the equipment. The Pennsylvania Department of Highways contracted with the township for the use of the equipment (a roller) and the operator. The "Commonwealth written" contract reserved, for the Commonwealth, the right to use the equipment when, where and as required by the Department of Highways. What might have appeared to the Commonwealth's contract writers as a necessary clause to ensure control, captured for them the employer's liability in the case of injury. This case also confirmed the doctrine of the 4-criteria test relating to the designation of the employer. The Commonwealth, by its contract language and subsequent actions in accordance with that language, satisfied the 4 criteria. The court's ruling held that the Department of Highways became the employer of the operator for workmen's compensation purposes.

### Application to the Owner

The Department of Highways had started out with a contractor-contractee relationship and from the case it is evident that they intended to



maintain that. However, that intent fell before the status change that accompanies the satisfaction of the 4-criteria test.

The owner is also vulnerable to a similar status change. The well-established doctrine of the contractor-contractee relationship will not stand before the case law that establishes employer status with these four criteria, regardless of how earnest and well-documented the intent to the contrary. This exclusion of original intent, in favor of intent demonstrated by subsequent actions, overrules even the language of the contract document itself.

### The Statutory Employer

The relationship of statutory employer was developed in Chapter 2. Briefly, the statutory employer is one who is identified as the employer for the purposes of the Workmen's Compensation Act by the force of the statutes and not by his role as identified by the existence of, or lack of, a master-servant relationship.

Section 203 of the Act defines the concept and as noted in Chapter 2, the 3-criteria which test for the establishment of "statutory employer" status are:

1. A contractual relationship.
2. Occupation/Control of the "premises"
3. Engagement on or about the employer's normal business.





This 3-criteria test has been graphically represented in Figure 6, showing it's relation to both the 4-criteria, master-servant test, and to third party status determination points.

### Owner Options

One of the potential traps for an owner is to be positioned in such a way as to satisfy the "statutory employer" status and thus relieve the contractor of employer status. The owner would then be accepting the Workmen's Compensation Act liabilities.

Conversely, an owner exposed to a large financial vulnerability as a result of a third party action may desire protection from that unlimited process and cut expected losses by hiding behind the shield of the caps on compensation imposed by the Workmen's Compensation Act. This can be done if the owner can prove statutory employer eligibility and then under exclusive remedy, relieve itself of third party liability.

Because this is a different category than the normal "employer" status it is treated separately. Either category may apply and both may be raised in a given case if one party is particularly desirous of a determination relative to employer status one way or the other. That party could request consideration under both categories, hoping to be found successful in at least one.



## Determination of Owner Status Using the 3-Criteria Test

In determining when an owner may become a statutory employer the court will look at the three criteria for statutory employer status. It is important to note that these criteria are different than those used for employer-employee status determinations. However, in some cases a litigant may be eligible to try for both determinations if the situation is uncertain enough to make the appropriate category unclear.

### The First Criterion of the 3-Criteria Test

The first criterion, and the principal difference between the category of employer-employee and statutory employer determination, is the existence of a contractual relationship. As explained earlier, this contractual relationship usually involves prime contractor/sub-contractor contracts. In Pennsylvania this has largely been interpreted to read that the prime contractor is the statutory employer. However, every independent contractor, hired by an owner also has a contractual relationship with that owner. As noted in the section under independent contractors, the language of the contract does not necessarily stand firm on it's own. Post award actions tend to overrule the specific language of the contract. The first criteria of becoming a statutory employer is potentially satisfied by the owner when he signs the construction contract with the construction contractor.



It was previously shown that the law seeks to preserve the contractor-contractee relationship if the parties do nothing to change that. From the owner's perspective the document that establishes this contractor-contractee relationship also opens the judicial door to possible statutory employer status. To avoid that designation, the owner must look to the other two criteria and ensure that they are not also satisfied by subsequent actions.

### The Second Criterion of the 3-Criteria Test

The second criterion, like the first, is somewhat camouflaged. The owner owns and controls the premises prior to the construction contract.

Therefore the owner potentially satisfies criterion number two by simply contracting with the construction contractor and not making additional arrangements. To avoid satisfying the second criterion, control of the premises should pass to the contractor, at least for the immediate area of the work. This may seem uncomfortable to the owner who will be tempted to retain some control, but if control is maintained, then only the third criterion which avoids the statutory employer status and liability is left.

### The Third Criterion of the 3-Criteria Test

The third criterion is not as likely to be satisfied as the first two were. It is still a possibility, although it is the most likely criterion to remain unsatisfied in a normal contractor-contractee relationship.



"In the course of the normal business" is highly subjective and should be respected as such. Some guidelines do apply, though, as was indicated in chapter 2. One of the most crucial is the subject of maintenance. Because it has been held that this is in the normal course of a business, the owner must be careful about the lines between new construction, renovation and maintenance, *Thomas v. Bache*, 351 Pa. 220, 40 A.2d 495, 1945 and *Davis v. City of Philadelphia*, 153 Pa.Super 645, 35 A.2d 77, 1944. It will be the judge's and not the owner's definition that will decide the case. The owner should not presume that the judge will be unskilled at making a determination or that the court will be easily fooled about the duties of a contracted maintenance "employee."

### The Owner as Statutory Employer

The designation of an owner as the statutory employer for individuals that were hired as independent contractors is rare. However, exceptions occur as the following cases will demonstrate.

In *Hauger v. Walker Co.* 277 Pa. 506, 121 A. 200, 1923, an expert mechanic was called in to repair machinery when the repair required was beyond the capabilities of the Walker Company's own personnel. The mechanic died, as a result of an accident, and the court determined that repairs on its machinery were a part of the normal business of the company. Therefore, statutory owner status applied, making the company liable for workmen's compensation for the dead mechanic.

In *McGrath v. Pennsylvania Sugar Co.* 282 Pa. 265, 127 A. 780, 1925, the Sugar company, a refiner of sugar, tried to hide behind statutory





employer status to avoid tort liability, when a stevedore working for a loading contractor was injured. The court found that loading was not a part of the normal business of refining sugar and held the sugar company liable under common law as a third party.

In *DeNardo v. Seven Baker Bros.*, 102 Super.Ct. 347, 156 A. 725, 1931, the court established an employer-employee relationship for the driver of a bread delivery truck despite the Seven Baker Brothers' claim that he was an independent contractor. However, the *DeNardo v. Seven Baker Bros.* decision was countered in 1944 in *D'Allesandro v. Barfield* 348 Pa. 328, 35 A.2d 412, because the second criterion of statutory employer status, control of the premises where the injury occurred, was not satisfied. The other 2 criteria were satisfied by the case and both cases pointed to the necessity of satisfying all 3 criteria.

In the previously mentioned *Freeny v. William Penn Broadcasting Co.*, the owner avoided statutory employer status when the court found that "moving radio equipment" was not in the normal course of the business of radio broadcasting. The owner was not the statutory employer because the third criteria was not satisfied.

Finally, in *Reiter v. Garman* 107 Super.Ct. 269, 163 A. 74, 1932, the owner of a mine was held liable under the Act for injuries sustained to a contract miner because the miner was on the premises, engaged in the normal course of the mining business and the owner, by all accounts, was exercising control of the mine and the mining operation. Both master-servant and statutory employer terminology were used in the court's decision with the final result indicating a statutory employer relationship.



## Attempts to Abuse the System

It is important to recognize that the courts are not blind to the inverse side of the issue of statutory employer status. An owner who recognizes that actions prior to an injury have created a liability as a negligent third party cannot expect to attempt to easily become the statutory employer.

## The Westinghouse Cases

It was recognized years ago that the growing third party liability awards started making the capped liability of the employer attractive to third parties, in some cases. Therefore the courts have held that there is, "...very great care which must be exercised before allowing an employer to avoid his liability at common law by asserting that he is a statutory employer. Section 203 of the Workmen's Compensation Act, which was designed to extend benefits to workers, should not be casually converted into a shield behind which negligent employers may seek refuge.", *Stipanovich v. Westinghouse Electric Corporation*, 210 Super.Ct. 98, 231 A.2d 894, 1967.

Note the dual use of the term employer, in reference to Westinghouse who was occupying a role as the owner with regard to the construction (renovation and relocation specifically) of some machinery. Stipanovich was an employee of the contractor that Westinghouse contracted with for the renovation and relocation task. The failure to prove that this renovation and relocation was a part of the normal business of Westinghouse caused the court to deny Westinghouse's contention that it was the statutory employer.



This forced Westinghouse to accept a previously adjudicated settlement under negligent third party liability.

The concept was also tried before a federal jury, that same year, in *Jamison v. Westinghouse Electric Corporation*, 375 F.2d 465, 1967. This time it involved a painter who fell to his death. The jury could not agree with Westinghouse that the painter was engaged in the normal business of Westinghouse and would not allow Westinghouse to assume the mantle of statutory employer. Nonetheless, Westinghouse pursued the matter to the Court of Appeals where it lost again. The Court of Appeals did seem to give some credence to the concept that the painter could have been engaged in the normal course of business. However, the court rested its decision on the fact that Westinghouse did not prove the relationship of the painting to the normal course of business. Note that preventive maintenance painting, such as for rust prevention, would not necessarily be excluded!

### Early Foundation for Limiting Abuse of the System

The effort expended in pursuing these cases was considerable and the benefit to case law of these recent, clear decisions is unquestionable, yet despite Westinghouse's persistence, the principle was actually established in recognizable form thirty years previously and perhaps should not have been so strongly contested. The case in question is *McDonald v. Levinson Steel Co.* 302 Pa. 287, 153 A. 424, 1930.

Levinson Steel Co. had contracted for the erection of a steel building on land that they controlled. When a steelworker was injured they moved to avoid tort liability by claiming they were the statutory employer. All three



criteria were apparently satisfied; contractual relationship, the injury occurred on their premises and Levinson was normally in the business of erecting steel. However the court ruled against Levinson, forcing them to accept common law tort liability instead of workmen's compensation liability. In finding against Levinson, the court made a specific point of noting that Levinson's normal course of business did not include that building, as it was under contract, and that in the eyes of the court the statutory employer "contractual relationship" must be one of prime and sub-contractor, which this was not.

The decision in this case allowed 5 criteria as opposed to the 3 established by this author's thesis. However, 3 of those 5 criteria involve contractual specifics and the remaining 2 are identical to the author's 3-criteria test.

The specifics of the "contractual relationship" do not hold up as well in subsequent decisions. Currently, any contractual relationship appears sufficient for consideration. However, the owner should take careful note of the court's definition of "normal course of business." It reflects the same perspective expressed in the Westinghouse cases and serves to limit owner access to statutory employer status.

This case served to reverse some of the trend noted in the previously enumerated cases where the courts attempted to find the owner responsible as statutory employer. The fact that this owner was known to be facing a greater tort liability, in negligence proceedings, appears to have been a factor. The same outcome is observed in the previously mentioned McGrath v. Pennsylvania Sugar Co. where the owner also had a large common law tort





action pending and tested the statutory employer provision by attempting to duck behind it.

### Other Special Cases Affecting Employer Status - Agency and Knowledge of Skills

There are two special cases that affect the owner's possible assumption of employer status. One special case is agency, having someone else act in the owner's name. The other special case is the level of knowledge possessed by the owner, of the skills applicable to the injured employee's tasks.

#### Agency

It is important to consider the concept of agency. Briefly mentioned in the preceding paragraphs, there is a question of when agency may occur in the context of this research.

The owner will customarily employ several individuals who may act as his agent with regard to specific duties. These include inspectors, engineers and contract administrators. Agency as a function of their jobs as assigned by their employer, the owner, is assumed. Defining when someone is or is not an agent is outside the scope of this thesis. However, agency by these individuals as it defines the identity of the employer for workmen's compensation is intrinsic to this topic.



## Agency Defining the Owner's Role

The answer to the basic question, 'If agency is established can this change the employer designation?' is found in *Busch v. Bientzle*, 119 Super.Ct. 559, 181 A. 2d 520, 1935. The court states, "...if an agent, with authority, either expressly or impliedly, employs help for the benefit of his principal's business, he creates the relationship of employer and employee between such help and his principal."

In the previously mentioned *Bogan v. Smoothway* (covered in the independent contractor section) the truck driver, unquestionably an independent contractor up to that point, lost that status and became an employee at the request of an employee (the crane operator) of Smoothway construction. This employee successfully obtained the driver's help in steadying the water tank that had previously been the truck driver's cargo. The link to Smoothway Construction Company was the determination that the employee of Smoothway acted in an agent status and effectively had "hired" the driver for Smoothway at that time.

Therefore, the conclusion is reached that an agent of the principal (i.e. an employee) can impose upon his employer an employer-employee relationship with someone that the agent employs. However, several conditions must apply.

## The Conditions for a Status Change

Principally there must be authority. Note in *Busch v. Bientzle* the mention of either express or implied authority. This is really the key point.



In *Corbin v. George* 308 Pa. 201, 162 A. 459, 1932, a company car driven by a non-company driver injured a mother walking home with her children. The judge ruled that there was no authority for agency with which to attach the driver to the company. Therefore, there was no establishment of the employer-employee relationship, since the master-servant relationship upon which it is based can not be imposed on a person (in this case, the company) without consent, express or implied.

Secondarily there must be employment. Voluntary work and incidental employment, treated elsewhere in this paper, still do not count. The other elements used to determine the master servant relationship (4 criteria) or the statutory employer relationship (3 criteria) remain applicable.

Finally, as noted in Chapter 2, there is a special exception in emergencies. *White v. Consumers Finance Service, Inc.* 339 Pa. 417, 15 A.2d 142, 1940 affirmed that if an employee acting under emergency conditions hired help and the help was injured, the original employee's employer would be held liable for compensation since the emergency conditions created an implied authority as an agent to hire help to protect the principal employer's interest. In this case the judge ruled that a stalled vehicle was not an emergency and therefore agency was denied.

The other special case, one that is mostly used as a defense in efforts to avoid employer status, is the presentation of facts that the supposed employer could not be the employer because of a lack of the necessary skills to supervise the injured employee. Neglecting the rather subjective topic of "sufficiency of management skills" for which the author found no



documentation of a trial in court, this appears at first glance to be a good and sufficient defense. It is neither.

In *Potash v. Bonaccorso*, 179 Super.Ct. 582, 117 A.2d 803, 1959, the issue was specifically put to the test. The ruling stated in part, "The fact that a particular occupation may involve such technical skills that the employer is wholly incapable of supervising the details of performance does not preclude a master-and-servant status." The ruling went on to propose as examples the employment of a cook in a business where the employer knew nothing of cooking, or the retention of a doctor or a lawyer on somebody's staff. It was even noted that in the case of cooks and perhaps gardeners the contract for employment may specifically state a level of non-interference and that such a clause would not be sufficient to defer the master-servant relationship. Although not specifically stated in that decision, it clearly applies the doctrine established in the master-servant criteria of the existence of the "rights" as being sufficient to establish the relationship, as opposed to the actual exercise of those rights

### Two Strategies for Making the Owner an Employer

Generally it was shown that the owner is protected from employer status in Pennsylvania. This protection appears to be significantly more complete and well established than is evidenced in similar cases nationwide. However, there remain two types of cases where there are parties interested in identifying the owner as the employer, even in Pennsylvania.

The first arises when the contractor is small and insufficiently prepared to accept responsibility as the employer. Accepting this





responsibility allows prior preparation with a full knowledge of the costs and subsequent immunity from tort liability. This is attractive and most prime construction contractors should endeavor to be identified as the employer. This is desired by the wording of the statutes and is the normal course of events. However, if after the injury, the contractor is financially weak with regard to the compensation, and there is no significant threat of third-party liability beyond the compensation limits, then an act to have the owner's status changed from contractee to employer could be attractive.

Secondly, the owner may wish to hide behind the protection of the compensation caps as demonstrated in Westinghouse Electric, Levinson Steel and Pennsylvania Sugar Company cases. This occurs when third party liability is likely because of either reasonable cause based on the owner's actions, or because the deep pockets approach is being used by the injured party. In either case, the owner may find that the third party stakes are high enough to warrant seeking liability as owner, and the protection of exclusive remedy, to avoid the uncapped result of a tort action.

### Summary

The solution to defining the owner as either the employer or a third party is the application of the tests as the courts have developed them. For an employer-employee relationship the 4-criteria test of "Hiring, Firing, Timing and Methodology" is used. If all 4 parts are satisfied then master-servant status is confirmed and an employer-employee relationship exists with respect to the Workmen's Compensation Act.



If a contractual relationship exists the primary focus becomes the 3-criteria test; "contractual relationship, control of premises and normal course of business." If all 3 criteria are satisfied then a statutory employer relationship exists. However, the perspective of the courts was shown to have changed from that of the original cases. The earlier decisions construed these criteria loosely and tended to force the statutory status and subsequent liability onto owners who otherwise had no liability. More recent decisions, coming after *McDonald v. Levinson Steel Co.*, have used a much stricter definition of the criteria with the result that owners faced with larger third-party, common law tort liability have been unable to avail themselves of the liability caps and exclusive remedy protection afforded by the Workmen's Compensation Act.

In all cases, and especially in attempts by owners to avoid tort liability, the concept of the independent contractor-contractee relationship was reaffirmed by the courts. It can be overruled by post award actions that create a master-servant status and hence an employer-employee relationship, but it was never excluded from consideration relative to the decision.

It has been shown that agency is fully effective in determining workmen's compensation status, carrying the same weight that it has in other legal disputes. Rental equipment, with operators, is a special case in construction but is resolved uniformly with the other workmen's compensation issues, using the same sets of criteria. Lastly, it was noted that a lack of technical knowledge is not a successful defense in attempting to prove lack of control and subsequent lack of employer's liability.



## Chapter 5

### CONCLUSIONS

#### Introduction

This research has identified the elements that determine the liability of an owner in the event of a construction contract worker's injury. The roles of employer and third party were examined and the liability associated with each role was discussed.

The focus of the research, the determination of whether the owner is the employer or a third party, was covered in Chapter 4. Two sets of test criteria were identified and case law validating their applicability was cited.

#### Summary

The following sections summarize and conclude this thesis. The topics are drawn together and recommendations are made with application to both the general case and to the laboratory example.

#### The Safety Liability Environment

It was shown at the outset of this work that the current safety and safety management literature had not developed a focus on the issue of the owner's liability following the occurrence of a construction worker injury. In fact the entire subject of liability for injury to construction workers was



notable by its general absence in all the current and leading works that were reviewed.

The impression that this author was given, during study of these references, was that the various authors were inadvertently developing a theorem that may not ever actually occur, even if it did appear to be a desirous end result to safety investigations, as a whole. The theorem in question appeared to suggest that if sufficiently strong measures were taken, the accident problem would either go away completely or at least vanish into insignificance. Therefore, the liability question could be shelved and ignored.

### The Proof of the Problem

A safety survey was conducted to examine, first-hand, the current extent of the safety problem, on contemporary construction sites. A considerable number of OSHA safety violations were observed. Many included an imminent risk of serious or fatal worker injury.

It was observed that safety consciousness was a function of the individual site and that the site superintendents' varied approaches were mirrored in the daily conditions on the sites. It was also observed that there were numerous safety hazards which were capable of being corrected with proper attention.

The conclusion was reached that the owner should not assume that its construction sites were safe. The individually varying conditions and ample supply of hazards did not represent a situation where it was reasonable to assume that nothing would ever happen. The OSHA standards





were developed through study of painful and often tragic circumstances. The lack of an injury at a given moment is not as persuasive as the history of how a given hazard contributed to someone else's suffering in the past. The sites examined during this study were not safe, though they may continue to remain lucky.

### The Need for the Research Reviewed

If the sites are not safe, and if a worker may be injured, then the question for this thesis is raised. What is the owner's liability after the fact? How can it be predicted so that it isn't erroneously assumed when it shouldn't be?

The question became one of definition. The liability of the various parties after a construction contract worker's injury is directly related to the role that the party in question had assumed up to that point.

### The Owner's Roles

There were three relationships defined that produced the roles with which the owner could conceivably be identified. They were:

- (1) Employer-Employee Relationship
- (2) Independent Contractor-Contractee Relationship
- (3) Statutory Employer-Employee Relationship

Each relationship has different liabilities and vulnerabilities in the case of a construction accident. It was shown that in the case of two of the



relationships the owner would be classified an "employer". In the other case the owner was a third party to the injured worker.

### **The Employer's Liability**

The liability of the employer role was covered in Chapter 2. The employer's, and statutory employer's (when that classification applies), liabilities are covered under Pennsylvania's Workmen's Compensation Act. This act forces the employer to accept responsibility and liability in case of an injury, regardless of where that liability may be presumed to have fallen if a common law, tort action had been fought.

This enforced responsibility was designed to ensure that the injured worker was properly compensated and didn't become an innocent victim of a shrewdly fought legal battle among experts that had lost sight of the worker's perspective in the issue. The courts ruled that liberal construction in favor of compensating the worker was to be balanced with a strict interpretation of the statutes, in all other regards, because the statute was not in accordance with existing common law principles.

### **Exclusive Remedy**

The employer was given the privilege of exclusive remedy to parallel the statutory requirement to accept responsibility. The employer's liability in dollar value was strictly capped and detailed in amendments. The net result was that the employee could not hope to recover as much under the Workmen's Compensation Act from the employer as would have been



possible in a successful tort action against the employer for negligence. Furthermore, the exclusive remedy provision did not allow the employee to sue the employer for any further costs outside of the limits set forth under the Act.

### Statutory Employer Liability

The employer was also held to be responsible for the subcontractors hired to prosecute the work of the project on which they were employed. This required satisfaction of a 3-item set of criteria that included a contractual relationship, control of the premises and an employee injured while engaged in the normal course of the statutory employer's business. Once these criteria were satisfied, that party became the statutory employer which required acceptance of all the responsibilities of the employer in the usual sense.

### Minor Points Related to Employer Liability

If the employment could be categorized as "incidental," the Workmen's Compensation Act did not apply and the only remedies available were in the common law arena. But if the employee was a minor, the full force of the compensation act did apply with the solitary exception of a case where the young employee was fatally injured and the parents had not had a previous opportunity to accept or reject the Workmen's Compensation Act. In this case the parents could make the decision after the fact. This privilege



allowed them to pursue a tort action against the owner or take the compensation if that was more lucrative.

The amount the employee received under the act did not cover all the expenses, only a portion of them. This meant that tort actions against third parties who could be proven negligent remain an attractive means of making up the difference between a family's income prior to the accident and the amount provided by the compensation.

### The Liability of the Third Party

In Chapter 3 the liability of the owner in a third party suit was examined. It was noted that the employee could almost always find a sufficient cause of action against the owner with which to bring the matter to trial. It was also noted that, in Pennsylvania, neither the employer nor the employer's insurance carrier could initiate an action against the owner for negligence. This was regardless of any compensation amounts they may have paid to the injured employee or whether the owner was negligent or not.

### Subrogation and Related Points

Under the right of subrogation, either the employer or the insurer, whoever had paid the compensation award, could join an existing suit by the employee against the owner. Once joined, the employer, or insurer, had first rights to the amount recovered by the employee in the lawsuit, up to the amount paid out by them in compensation. The employee would receive the





excess amount and was deemed fairly compensated by virtue of already having received the compensation award.

This put the owner in the position of having to pay the entire amount if found to be sufficiently negligent. Then it was shown that, in Pennsylvania, unlike some other states that have proceeded with tort reform, "sufficiently negligent" to be responsible for the whole amount could be as little as 10%. Indeed, there is no evidence to suggest that it can't be even lower than that. Effectively, the owner is liable for the complete amount of damages if proven, in court, to be the least bit negligent.

In some states the employee is forced to "elect" one course or the other, either compensation or a tort action. This was not applicable to Pennsylvania. The employee could immediately receive compensation from the employer or insurer and concurrently seek additional amounts through an action against third parties which could easily involve the owner.

### Negligence

Negligence was shown to form the basis for all vulnerability to liability that the owner, as a third party, might face. It was discussed in a general sense and it was noted that the determination is a subjective one that is usually given over to the jury for a decision. However, through a condensation of several works, the author presented a five part guideline for the owner. This guideline may help increase awareness of major scenarios that have held the most risk of an assumption of liability, due to negligence.

These five guidelines were described as (1) selection of the contractor, (2) provision of anything, especially tools, equipment or the site, (3) control



of the job, whether exercised or just retained administratively, (4) vicarious, nondelegable duties to the employee for extra-hazardous types of work and (5) ratification of an unsafe condition by the action of approving it.

Practically speaking, some of the techniques that are most useful in administering a contract construction job and ensuring the results that are desired, are also avenues that increase the owner's vulnerability to subsequent liability in the event of an accident injuring a worker. The owner has a tough decision to make.

### OSHA Violations

OSHA regulations did not increase the vulnerability of the owner. A strong and consistent set of case law that said OSHA violations were not a sufficient cause of action in themselves. While it did not rule out OSHA violations being used as one of a number of indicators of negligence in tort proceedings, it did eliminate the possibility of liability merely because an OSHA violation could be identified as a proximate cause of the accident.

### Indemnification

The second factor, in the owner's favor, was shown to be indemnity. Perhaps the most important defense against liability, indemnity is the privilege of the contract writer, who is usually the owner.

The indemnity clause allows the owner to forestall the subrogation right of the employer or insurer by having them sign away that right with the language of the indemnity clause in the contract. Despite all other



precedent or common sense to the contrary, a precisely written, unambiguous indemnity clause will almost always win over all other factors. The contract is taken to show the intent of the parties and when that contractual intent is clear, it holds up.

While 20 years ago, indemnity was mostly a matter of avoiding reimbursement of subrogated compensation claims, recent court actions were cited that hold a valid form of extended indemnity exists that allows the owner to pass the entire judgement on to the indemnifying contractor.

Because this allows the owner to escape payment of damages, even when negligently responsible for the injury, the courts have been very strict in allowing it. However, with a properly written clause, very clearly and expressly identifying that the owner is completely indemnified, even for his own negligence, the indemnification can stand up in court.

The owner must remain aware, though, that any interpretation of the clause that will deny this privilege will be used, because clauses are construed against the author of the document. It also goes against established principles of common law that would otherwise spread the judgement for payment more appropriately.

### The Determination of Roles

Having already covered the liability of both the employer and the third party, Chapter 4 addressed the question of when the owner played each role. This question was the original point of interest for this thesis and it was noted as particularly important because of the large differences in the amount of financial liability that were attached to each of the two roles.



The definition of the two roles was inextricably woven into the fabric of the wording of the Workmen's Compensation Act. This was validated by subsequent decisions in the courts.

The Act defined the employer-employee relationship as one of a master and a servant. Considerable amounts of case law were devoted to interpreting this phrase which had its basis in common law. Through an examination of the existing case law, a 4-criteria test emerged for defining a master-servant relationship.

### The Criteria Tests and "Rights"

The master-servant 4-criteria test included the power or right over: (1) hiring the employee, (2) firing or discharging the employee, (3) timing of the sequences of work and (4) methodology of the work. It was expressly shown that no exercise of any of these was required as long as the prospective employer had the RIGHT of control over them.

While all four criteria are considered necessary in most cases, it was also shown that several cases appeared to establish a subjective ranking of importance which was roughly the inverse of the way they were presented above. In fact, 2 cases showed that only the third and fourth criteria were necessary for a determination of owner status.

The role of the independent contractor was discussed as it relates to the owner. It was noted that this is the normal relationship between an owner and a construction contractor. Several cases were presented that dealt with special situations where the independence of the contractor was an issue. One specific type of special situation, with repeated application to





construction contracts, that of the operator of rental equipment, was given extra treatment. However, it was noted that there were no unusual points of law. The same 4-criteria test continued to apply.

The companion role of the statutory employer was discussed and it was shown that the 3-criteria test developed in Chapter 2 continued to hold. If the owner satisfied these criteria then the statutory employer role applied. It was further shown that in the early years after passage of the Act, the court cases tended to involve owners attempting to avoid the statutory employer designation.

More recent cases, with the spectre of unlimited tort liability waiting in the wings, have produced owners trying mightily, though generally in vain, to establish for themselves a status of statutory employer. This would allow them to avoid third party liability under exclusive remedy statutes.

### Agency and Skills

Completing chapter 4, agency was shown to be valid with regard to this thesis topic, a factor that must be considered by owners that employ contract administrators and inspectors. There was no special limitation on this agency, so the full measure of liability may be applied to the owner as a result of an agent's actions. Additionally, it was shown that lack of sufficient knowledge or skills, with which to supervise an injured employee's work, is not a defense for the owner, in these cases.



### Conclusions

The owner can be liable as the employer or statutory employer, for amounts defined by the Workmen's Compensation statutes, if the owner's actions satisfy either the three-criteria statutory employer or the four-criteria master-servant tests. Failing this, the owner is vulnerable to being named, as a defendant, by the injured employee, or his estate, in a common law tort action. If named in such a suit and found negligent, the owner can expect to pay the entire compensation amount (back to the employer or insurer, under their subrogation rights) as well as any additional damages awarded for negligence, pain and suffering or punitive punishment. The owner's defenses are a properly written indemnification clause, which will force the indemnifying contractor to pay the judgement, and actions, prior to the injury, which avoid any attachment of negligence.

The owner should expect the role of defendant third party in most injury situations occurring in Pennsylvania. Several large, powerful, corporations have already failed to avoid tort liability by attempting defenses alleging employer or statutory employer status. The majority of recent test cases indicate that the courts will limit an owner's attempts to use these roles for avoiding proper responsibility..

### Application of the Above Findings to

### The Laboratory Example: Penn State

Penn State is actually in a fairly good position relative to injury liability. Most of the appropriate measures are already in place.



As stated previously, the assumption is that the University does not desire to escape liability that is appropriate to assume. Therefore the author concludes that the University is not desirous of attempting to force an employer or statutory employer designation.

### Current Measures

If the above assumption is correct, it is considered appropriate that the contract administration staff is small, inspects periodically, but does not control the work on the sites. There is currently no reference in the standard contract format which gives the University rights over hiring or firing of the contractor's employees. Therefore, the four-criteria master-servant relationship would not apply.

Concurrently, it is clear from the fences, signs, contract language and the author's site safety inspection observations that the site is controlled by the contractor, rather than the University. While it is not clear in the maintenance arena, the new construction sector is unlikely to be construed as being within the normal course of the University's business. Therefore it is again possible to conclude, with confidence, that the three-criteria statutory employer test would not apply.

### Assumption of Third Party Status

With both the employer and statutory employer tests failing to apply to Penn State in its current mode of operations, the University can expect to shoulder the third party liability appropriate to any owner. Thus, the



University can expect to be sued in a tort action for any injury that involves any factor that could be shown as negligence on the part of the University.

As previously shown, the two defenses available to the owner, in the event of a negligence suit launched by the injured employee, are to have conducted itself with due regard to avoiding the assumption of negligence, prior to the injury, and equipping the contract with a well-written indemnity clause.

### Indemnity Clause Review

Because of the greater assurance of payment associated with a contractee such as a major university, it is quite conceivable that a contractor may be induced to sign a contract with stricter liability for indemnifying the owner than would normally be the case. In any event, the author is not a lawyer, and recognizes a lack of preparation necessary to comment on the merit of specific portions of a given indemnity clause but this remains an area that should clearly receive attention from the owner, in this case the University.

A review of the standard indemnity clause should be conducted by the University's lawyers. This should be done with attention to the level of risk the University is willing to assume as a trade-off against a clause that is so dangerous to the contractor that the more knowledgeable ones (presumably some of the better performers as well) would be threatened by it and elect to avoid bidding the jobs.





## Avoiding the Assumption of Negligence

The University should examine where it may be producing scenarios that provide for the assumption of negligence on the University's part. These should be minimized wherever possible.

### Active Negligence

Specifically, there should be a method for avoiding the selection of an incompetent contractor. The author is aware that this is already in place. The University contract administration staff routinely institutes contractor pre-qualification for placement on the bidder's list.

Additionally, the University should carefully monitor all things provided to the contractor. This includes tools, equipment, materials and the site itself. Everything provided has a requirement that it work safely. If it doesn't, then the provider is negligent. This is so well established that, if it weren't for the occasional gains to be had in final product by providing some parts or tools, it would be prudent not to provide anything at all. In fact from the injury standpoint, it is unfortunate that the site must be provided. Until the site has been changed completely by the construction process, the provider of the site could easily find himself liable for any injury that occurred there because of the existing conditions. A little pothole or icy slope could result in expensive litigation. This is even more important if there is a subsurface condition, such as an old mineshaft, high levels of radon or whatever.



The University must endeavor not to control the ways and means of making progress with the work on the site. This is an issue for proper training of the University's inspectors. As shown in Chapter 3, incidental or periodic inspection is not a problem. The courts affirm the owner's right to try and verify the quality of the work. However, verification, and using that knowledge to affect payment is different from using the inspection force to ensure a quality product. The more enforcement that is occurring, the more likelihood there is that control will be satisfied and because of agency, if the inspector makes a mistake, the University is liable.

### Vicarious Negligence

The definition of ultrahazardous and inherently dangerous work was shown to be subjective and open to interpretation. The most probable result is that basic, everyday construction will not be included in those categories but there is no guarantee of that. Additionally, if the job is not strictly routine and there is a question that it might fall into one of those two categories, then the University should assume that it does. The case examples included work on a pressure vessel, high rise work and work similar to mining. If these satisfy the criteria, then many tasks performed as construction at a major university will also. If this applies, it is non-delegable (except by an indemnity clause) and the prudent course of preparation would be to examine the University's insurance for coverage in this area. It would be unwise to discover that the insurance company didn't cover this type of activity, after an accident has occurred.



## Ratification

Finally, the University's contract administration branch should examine all approvals that they perform and compare them to the possibility of ratification of an unsafe condition, such as the foundation that failed during construction, after being approved by the owner's engineer, as discussed in Chapter 3.

Some approval is needed to ensure compliance with contract plans and specifications. Lack of sufficient approval mechanisms could require a much longer investment in time to completion or dissatisfaction with the end product. However, every approval requirement that is deleted will reduce ratification vulnerability and free up time for the members of the University's own staff, who previously had to perform that review function.

The above recommendations on negligence do not purport to be the fully inclusive list of recommendations or observations that can be made. However, they do represent the author's carefully considered view of the salient factors that apply to the area of interest of this thesis, as demonstrated by the results of this research. It is in that spirit, and none other, that they are presented.

## Imminent Danger

A persistent question concerns the inspector or OPP employee who observes an "imminent danger" safety violation. Is this negligence if the safety violation is ignored? The author does not know. The case law reviewed during this research was silent on the issue.



Negligence is almost always a question for the jury. If previous actions or contractual language established a duty in this regard then it is reasonable to expect that a jury would view it as negligence. However, there is no case law or precedent that the author is aware of that automatically establishes such a duty. If there is no duty then it is likely that there would be no negligence.

A reasonable course might be to warn the individual(s) in danger and notify the site superintendent. They are the individuals who could be hurt and who have a legal responsibility, respectively.

This issue is worthy of review by Penn State and investigation by researchers. No comprehensive study of the safety responsibilities of the engineer or inspector on the site (similar to this research of an owner's responsibilities) has been published. In the interim, all owners should review their inspection procedures and safety policies, with special emphasis given to the uncertainties of this concern.

### Safety Forms

The safety survey forms in the appendix were originally thought to have some possible application to the University's safety inspection program. The author specifically did not recommend such use for two reasons.

First, the forms were developed for generating data to be used by this thesis with knowledge of the general types of sites that would be visited. They were not developed for general application.

Secondly, as this thesis points out, it is not normally the owner's responsibility to enforce OSHA, which these forms are based on, or even





safety in general. However, increasing activity, of this kind, can increase the likelihood of assuming responsibilities that can lead to third party negligence suits. This is not recommended.

This stance was validated by the actions of the University's own lawyers. They elected minimal participation and specifically advised the University's OPP representative to reject receiving a copy of the forms during the time of the safety survey. This occurred at the meeting when the liability issue was first raised.

### The Laboratory Example Summary

In summation, the author feels that the laboratory example is in good shape with regard to it's current stance on construction contract injury liability. However, the author would also recommend a conscientious review of the standard indemnity clause, control or ratification possibilities by staff qualifying as agents and all things provided by the University to the contractors.

### Recommendations

The general recommendations to the conscientious and honestly motivated owner would take the form of the recommendations listed above in the discussion of the laboratory example. In summary, they would be to remain aware of employer and statutory employer criteria but not seek to qualify thereunder, review the contract documents used, to ensure that a sufficiently hardy indemnity clause is in place and look to the way your staff



does business, while comparing it to actions that produce assumption of liability for negligence and then minimizing them to whatever extent is possible.

### The Possibility of Completely Avoiding Liability

Recommendations to the owner who would seek to avoid any and all liability would take a different approach. First of all, an assessment must be made about your staff's chances of success in negligence reduction and your lawyer's chances of success at writing an ironclad, owner protecting, indemnity clause that won't scare away every contractor capable of completing the project.

If the assessment of these capabilities in your staff and lawyers is high, then the absolutely least costly course is the one noted above, assuming you never lose in court.

However, if the indemnity clause you have is expected to fail from time to time and the staff can't be trusted to avoid liability for negligence, then another course may be more profitable.

### The Reverse Determination Option

This alternative course is not easy, and it has been tried by large corporations who have failed in its application. But, it does have the capability of working. With prior planning that potential could be maximized.



The intent would be to qualify as either the employer or statutory employer. This would involve either payments to an insurance company or self-insurance to cover the obligatory compensation costs. It is assumed the owner would weigh these costs against the liability for negligence above before making a determination to try for employer status.

The procedure would involve qualifying under either the 3-criteria or 4-criteria tests. Because the master-servant 4-criteria test involves hiring and firing, the statutory employer 3-criteria test is believed to be the easier route. However, either set of criteria, if satisfied, is equally good at capping liability under the Act and qualifying for the exclusiveness of remedy protections.

Both sets of criteria would involve control of the site and most importantly, control of the work (4-criteria test) or that the work be part of the normal course of the business (3-criteria test). For the normal course of the business criteria, it would seem that a sufficiently ingenious company organization could be a suitable answer. This would again indicate that the 3-criteria, statutory employer test, is probably the vehicle of choice. Obviously the details would have to be adjusted based on the specifics of the situation.

This route is not what appears to be intended for the owner by the case law that the author has studied. It is definitely contrary to the principles of moral responsibility that are the foundations of restitution under common law. Accordingly, this method is not recommended by this author. However, it is clearly an option, although it has proven largely unsuccessful when tried by others.



### Possible Directions for Future Research

Several directions exist for possible future research. As noted above, the question of "imminent danger" situations is not resolved. The duties of an on-site inspector or engineer are not well established with regard to this type of situation. Further research is required. However, there may not be sufficient test cases, at the present time, with which to draw valid conclusions. The specific actions that an inspector may or may not take without establishing control is another possible area of research, although this also appears to lack sufficient test cases at the current time.

The professional responsibilities of a third party's professional engineer or architect, regarding safety liability, appears to have some unanswered questions. Additionally, a corollary topic to this thesis that might be interesting is the liability of the owner to an accident involving a bystander or passers-by.

Finally, the recent cases establishing extended indemnity have opened up the potential for contracts that make the owner invulnerable to liability. Determining the structure and wording of suitable clauses looks particularly inviting as an area for immediate application of future research.





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## Appendix A

### THE D.E.E.P. L.E.F.T. SAFETY SURVEY FORM



The Pennsylvania State University  
Thesis Data Form III-01

**D.E.E.P. L.E.F.T.**  
**SAFETY SURVEY DATA SHEET**

*(Drops-Electrical-Employer-Personal Ladders-Environment-Flammables-Trenches)*

**SITE** \_\_\_\_\_ **time** \_\_\_\_\_ **date** \_\_\_\_\_

**DROPS** 1926.500 - 502, 1926.750 & 1926.450 - 451


Floors, platforms > 6' drop -- rail & toeboards  
Wall openings (< 3' above floor) > 4' drop -- rails or covers  
Runway > 4' drop -- rail and toeboards  
Roof > 16' drop -- safety warning lines or belts  
Floor openings (1" min.) rail/toeboards or secured cover  
Other > 25' drops -- safety net (8' extension) or temp floor < 30' below  
Scaffolds (> 10' high) -- rails and toeboards (plus midrails if mobile)  
planks: 2 wide, with wire mesh (on sides) if workers below

**ELECTRICAL** 1926.400 - 404, 1926.954 & 1926.300-304


All electrical equipment grounded  
Grounding circuits -- fault protected  
Power tools -- "assured" grounding program or GCI  
Moving parts -- all covered or guarded  
Live parts -- all guarded, covered if > 50 V.

**EMPLOYER RESPONSIBILITIES** 1926.16, .20, .21, .23, .24, .28, .32(j),  
.50(f), 1926.150


OSHA notices -- posted, incl. 200/ann. survey Feb-Mar.  
Accident logs -- maintained, incl OSHA 200  
Emergency phone #'s -- posted  
Site safety plan -- posted  
First aid equipment -- must provide  
Instruction (general) -- must provide  
Pers. safety equip -- must require it to be worn  
Fire alarms/system -- must provide & method/system posted.  
Fire protection -- must provide, 1 ext. or hose per 3000 SF (L. MAX -  
100' + 1/floor min. + 1/(adj) stairway + 1/flammable (5 #'s  
or 5 gals.) site w/in 50'.







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**Special Cases:**

WELDING: see 1926.350 -.354

DIVING: see 1910.401 -.441

RIGGING: see 1926.257

ROLLOVER: generally required but see 1926.1000

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**HAZARDOUS MATERIALS IDENTIFIED IN OSHA**

2-Acetylaminofluorene 1910.1014

4-Aminodiphenyl 1910.1011

Acrylonitrile 1910.1045

Asbestos 1926.58 & 1910.1001

Benzidine 1910.1010

bis Chloromethyl Ether 1910.1008

Coal Tar Pitch Volatiles 1910.1002

Coke Oven Emissions 1910.1029

Cotton Dust 1910.1043

1,2 Dibromo-3-Chloropropane 1910.1044

3,3 Dichlorobenzidine 1910.1007

Ethylamine 1910.1012

Inorganic Arsenic 1910.1018

Methyl Chloromethyl Ether 1910.1006

alpha-Naphthylamine 1910.1004

beta-Naphthylamine 1910.1009

4-Nitrobiphenyl 1910.1003

N-Nitrosodimethylamine 1910.1016

beta-Propiolactone 1910.1013

Vinyl Chloride 1910.1018





## Appendix B

### DEVELOPMENT AND USE OF THE SAFETY SURVEY



This appendix covers the development of the safety survey and the procedures the author used in employing it to record safety data. The author attaches particular emphasis to the two different methods of data definition mentioned in the notes on usage.

### Notes on the Development of the Safety Survey

Development of the Safety Survey Form required about six weeks. This included some time spent visiting and selecting the sites that would be used. It was crucial to the organization of the form that the selected sites had ongoing work that would provide a broad basis for investigating OSHA requirements.

### Development Chronology and Site Selection

The author met with contract administration representatives of the Office of Physical Plant (OPP) of Penn State University. In these meetings the currently active sites and the purpose of this thesis effort were discussed. A tour of all the sites was conducted and four sites, based on job size and expected activity, were chosen for the survey.

Three sites were under the direct administration of the University staff. One was under the administration of the Director of General Services (DGS), a branch of the state government in Pennsylvania. In this case, DGS functioned as a prime contractor to the university and had a contractor-owner relationship with OPP. However, the DGS contract also included a provision for DGS to acquire a deed to the real property under construction



which had the effect of making the owner's inspection staff "guests" of DGS, who operated with an inspection staff of it's own.

The four sites selected were the largest, under contract, during the survey period which included July and August 1989. Large, active sites were preferred in order to have a broad data base for sampling. The author desired as many potential safety hazards, as possible, be present in the study. This was intended to avoid inadvertently skewed data if one particular type of hazard was prevalent.

The four sites chosen were a new multi-story Agricultural Sciences academic building, a new multi-story food services building, a new parking garage and a major, campus-wide utilities rehabilitation project.

### Safety Survey Form Development Goals

A new safety survey form was developed independently by the author for use in this study. Existing forms appeared to be either too cumbersome or ineffective in providing data that would address the questions being investigated by this work. A copy of the form is provided in appendix A.

The survey form was based upon several sources that identified the "worst," or "most numerous," or "most often observed," or "most often cited" safety hazards. It is the existence of these hazards, the well known, publicized and often lethal mistakes that had to be identified. Their presence would verify the author's assumption of the need for this investigation.



## Safety Survey Form Information Sources

The author started with a compendium of published safety checklists. These included the "Violations Most Often Noted," a 10-item checklist, published by the Western Pennsylvania Building Construction Industry under their Construction Advancement Program (CAP) of Western Pennsylvania, the "Job Site Safety Check List," a 24-item check list, published by the joint safety committee representing both CAP and the Pittsburgh Building Trades Council, AFL/CIO, and the "General Safety Rules," a 16-item list, also published jointly by the Western Pennsylvania Building Construction Industry, CAP, and the AFL/CIO. To these were added significant safety concerns noted in both the Penn State, OPP "Proposed Safety Program" (a handout for contractors who request guidance) and Penn State Department of Civil Engineering report No. 15, A Self Study Guide: Construction Safety Management and Control (Jack Willenbrock and Constantine Plassaras, 1982). Also added were items listed in several OSHA-published "top 10 items cited" lists found in various pamphlets and one 15-item OSHA-based checklist of unknown origin. Additionally, the author referenced three OSHA-published "Fatal Facts" accident reports and a 25-item checklist entitled "Construction's Most Serious Citations," based on OSHA reports, published in Vol. 13, No. 5, May 1989 issue of the Associated Builders and Contractors, Inc. Safety News. Finally, the author also referenced the 11 page, 100+ item "Original Site Safety Inspection Form" prepared by Naoto Narahara in his thesis (1988, p.101). This was partially to add to the completeness of the data sheet being developed. More





importantly, the author tried to avoid an approach that would create a mammoth document unsuited for field use

### Final Development of the Safety Survey Form

The above lists were organized into categories of similar hazard type and the complete collection was researched in OSHA publication 2207 (CFR 1910 and 1926 as of 1987) and the 1988 and 1989 updates of CFR 1910 and 1926 published separately.

The OSHA references provided the standards for all the hazards generated by the various lists and suggested further refinements to the classification categories that had been developed. However, as noted on the form itself the categories were not organized along the exact categories that OSHA used and several categories reference OSHA standards from multiple sections.

A mnemonic was developed that reasonably fit the 8 categories. Anyone who has ever watched a baseball game and heard a long flyball characterized as being hit to "deep left, center or right field" will find that the "D.E.E.P. L.E.F.T." mnemonic is easily recalled and quickly translates to the categories of Drops (falls), Electrical, Employer (responsibilities), Personal Protection, Ladders, Environment, Flammables and Trenches. The mnemonic was designed to speed the author's use of the form which even at only 3 pages was still viewed as rather cumbersome for field purposes.

The form was divided into two parts. The first two pages contained the checklist with the 8 categories, including the OSHA standards. A third page



listed several special case items and the complete Hazardous Materials listing from CFR 1910.

### Notes on the Use of the Safety Survey

Each of the four sites was scheduled to be visited approximately 3 times a week for 3 weeks generating a total of 36 site visits. The actual average of visits was slightly below three per week so the study period ended up being just under four weeks long (July 21st to August 17th).

### The D.E.E.P. L.E.F.T. Checklist

During each site visit the work was surveyed using the two pages of the D.E.E.P. L.E.F.T. checklist. Each item in the checklist was completed as appropriate to the individual site. The boxes on the left hand side were used to record either number of observations and number of observed violations, or number of men observed (related to the item in question) and the number of men at risk or in violation. The exact format used for each line item was largely dependent on the situation as it existed at the site and is usually self-explanatory. Where it was not, amplifying notes were recorded directly on the form.

A useful example of this process is to consider an upper story deck with improper toe boards and/or railings on some but not all sides. With no one working on the deck the procedure used was to record the total number of "sides" observed as requiring railings and also the number of "sides" that were improperly protected. This data could then generate a percentage of



proper protection for that item. If there were men working in the area, then the total number of workers and the number of workers at risk, because of the lack of proper protection, was recorded.

Recording "numbers of workers at risk" sounds somewhat subjective but in practice it was so clearly the superior method, that it became the author's choice whenever it was made possible by the work being conducted. These basic processes of data collection were used for all line items.

### The Third Page of the Safety Survey Form

The third sheet of the form was not very useful. Diving was not applicable at any of the sites visited. Rollover protection was checked the first time on site and whenever a new machine was observed but no lack of compliance was ever noted.

Welding was conducted in all cases by very qualified sub-contractors. The time spent to check on the details did not produce any definite violations and was inefficient compared to what a similar investment of time produced on more general concerns.

Rigging was similar to welding with the added difficulty that when not in active use, loads were usually suspended in the air beyond reach making them hard to inspect. When in use, the loads were not inactive long enough to get close, negating attempts to measure anything.

Finally, the hazardous materials list was useless because well marked containers were not in evidence. When an original container was near enough to the workers to verify it as the source, the author found that there was insufficient data either available or still readable on it for a



determination to be made. Quite possibly a trained or more qualified observer may know the constituent ingredients in some cases and therefore find such a list useful. But in the course of this investigation, the author found no instance of documented evidence in the field of any of the listed items, although the author remained convinced that some were probably in evidence, considering the work that was in progress.

The right hand side of the form was used to record notes and general observations. The area provided with the line was specifically used to record a subjective assessment of the category as a whole on that visit. This helped to reconstruct the situation observed when the data was being reviewed later.

Each site visit was approximately 45 minutes long. This varied depending on circumstances. The major variant was the type and amount of work being performed at the site. Additionally, as familiarity increased with the form and with each site, the author found that slightly less time was needed to perform the survey.





**Appendix C**  
**FINDINGS OF THE SAFETY SURVEY**



### Findings of the Safety Survey

Each of the 4 sites are discussed below, without identification, as sites A, B, C & D, to cover some site specific general findings. Following that, each category, from the survey, is discussed, separately, in detail, considering all the sites as a whole.

#### General Survey Observations by Site

##### Site A

This was the most interesting from a safety standpoint. The work involved all trades and progressed steadily. A major portion of the work involved upper stories, exposed roofs, scaffolding, floor openings and wall openings. Throughout the study there were problems with safety in all these areas but the problems were not consistent.

The site superintendent met with the author on each of the first three visits for longer than any other site superintendent, but by the end of the study period was actively avoiding the author. Hard hats were in evidence on approximately 60% of the workers, initially, but had become extinct by the fourth week. Hard hats were the subject of jokes in the first week but not thereafter. This site, alone amongst the others, allowed sneakers to be worn on site regularly and allowed junk and debris to become piled in random locations, where it remained.

This site had a labor problem brewing which separated the workers into at least three camps. Until the author's role was proven to be non-punitive,



some hostility was felt. Conversely, this site also had the most friendly workers encountered during the course of the study. This was particularly evident among those who were obviously counted upon by the superintendent to do most of the riskier upper level work, usually without even minimal safety protection. From their comments, the author believes that they enjoyed the status of that role and would have been less content if the safety measures, they so cheerfully ignored, had been in place.

### Site B

This site involved earthwork and trenching. It had the most immediate and real danger to the workers.

Most of the survey form was not applicable at this site. However, two parts that were applicable were the trenches themselves and the runways across the trenches for pedestrian traffic. The runways were done with attention to every detail of the OSHA regulations including the mesh below the railings. They were the best example of proper OSHA protection against falls at any of the sites. Denied access to this site, except for public thoroughfares, it was only because of the existence of these bridging runways that the author was able to gather full data here.

The trenches however, were improperly and dangerously shored from the start of the study. Discussions with the supervisor and the state appointed inspector revealed a callous disregard for this safety item. Discussions with several workers in the trenches revealed attitudes of fatalism, disgust and trapped helplessness. The trenches were never properly shored but following some inquiry, by the author, at offices outside



the job site itself, partial improvements were put in place as the study concluded.

Of particular note was the reaction of the workers who had originally, candidly discussed the shoring problem. Without exception, they exited the trench and left the immediate area, at the author's approach, during both of the two remaining site visits following the placement of additional shoring.

### Site C

This site was the most professionally run and the most safety conscious. This site enforced a visitor check-in and brief. The site superintendent requested a copy of each survey and the author noted that items marked as violations were often corrected by the next visit.

The one exception to the overall excellent safety posture was the upper deck work which continuously had a crew that was three days ahead of the protective railings, etc. Like site A above, these workers did not appear to want to change their methods and displayed pride in their confidence in themselves and in each other, doing what were probably the riskiest jobs on the site.

Requirements for personal equipment, notices and paperwork were rigorously adhered to and enforced personally by the superintendent. The management desired to use the presence of the author as an "OSHA inspection" and passed word to that effect. For several visits after that no conversation was possible with any worker. However, several workers eventually confronted the author about the issue and upon hearing the truth, about the survey's purpose, seemed relieved. Normal conversations with the workers resumed by the next visit but interestingly, the crew foremen





became less cooperative from that point on. This site remained the most clean and workmanlike of all four sites throughout the study time period.

### Site D

Site D was remarkable for some management decisions involved in it's design but had the least impact on this study. Concurrently, the author's presence appeared to have the least effect on both the management individuals and the workers.

The author talked briefly with the site superintendent about every third visit but it was usually limited to general pleasantries. Even when specific items were discussed, the prevailing attitude was casual interest without follow-through. The author felt pleasantly invisible whenever he was at this site. OSHA violations were low, primarily as a result of having neither significant trenching or multi-story work to do. When compared to the other sites in the remaining categories site D ranked ahead of sites A & B and behind site C.

## Survey Results by D.E.E.P. L.E.F.T. Category

### Drops

This category included floor and wall openings, runways, scaffolding, and most other situations where a worker might fall far enough to be injured with the exception of ladders. Generally, these areas required railings and toeboards, covers or safety warning lines. Of 56 observed "sides" of platforms or floors with drops of greater than 6 feet, 31 were observed to be in violation. Usually this was due to missing rails and/or toeboards. An



additional 52 men, of an observed 63 total, were counted working on floors or platforms without proper rails and toeboards in place.

Wall openings were present in abundance at one site and were initially unprotected with falls up to an estimated 30 feet outside them. During the study, protection was temporarily applied to an eventual maximum of 6 of the 10 wall openings. The protection was subsequently ripped down leaving only 2 of 14 wall openings at this site protected. Two other sites had minor problems with this, and in both cases applied protection to these areas by the study's finish.

On finished roofs, a total of 9 workers were observed working without safety warning lines or other measures. 100% of all roofs that had work performed on them during this study were unprotected as were all workers observed on them.

Runways were rare and tended to be temporary at three of the sites with 10 of 10 workers observed on unprotected runways and only 1 of 9 empty runway observations revealing protection in compliance with OSHA. The fourth site, however, had 7 runways in place with 6 completely and properly protected. The seventh was torn down by the second visit and from then on all the runways at this site remained in strict compliance despite high use.

Floor openings were properly protected in 66.7% (10 of 15) of the observed instances. Openings less than 8 inches maximum were neglected from tabulation, although OSHA includes criteria even for openings down to one inch.

Scaffolding was a major problem on both sites that used them routinely; 22 of the 25 observed scaffold sections were not in compliance. When



workers were counted, 64 of an observed 73 workers were working on improperly protected or constructed scaffolding. From just this category alone, in just under four weeks, 135 workers were observed working in proximity to an improperly protected place where they could experience an injurious or fatal fall.

As a practical matter, the survey need go no further as this alone proves the foundation assumption that there is a need for research in this area. The remainder of the survey is discussed below.

### Electrical

This category was a contender for the title "least useful category". There were three instances of unguarded moving parts where guards had clearly been removed or tied back on power saws, but other than that the author found himself unable to adequately determine if a violation existed. Asking the workers produced no answers and if it didn't have a violation, identifiable by the author, observed electrical equipment was counted as being in compliance.

### Employer Responsibilities

Without notable exception, whatever was in place at the start of the survey was exactly what remained in place until the end. This was true at all four sites.

Only one site had a complete board with most items posted, first aid kit visible and readily available, safety training held weekly and required logs maintained. Of the remaining sites, 2 had old worn bulletin boards with a couple random, faded notices posted that appeared to have been there for



several jobs or perhaps years. The last site had nothing posted and made no observable effort to meet even the easiest standards.

The author was aware that he was observed, by each site superintendent, studying the boards and writing comments. However, only the site that was already very much in compliance had a superintendent who took the time to ascertain what possible violations were found there.

### Personal Protection

This category really showed the effectiveness of the the superintendent in promoting safety on site. On the site where hard hats, safety shoes, eye protection and face protection were required, there was 100% compliance with hard hats and safety shoes and no instance of eye or face protection violations being repeated over 2 site visits.

At the site where hard hats were a joke item, compliance with hard hat requirements dropped from an early "high" of 71% to the point where hard hats were observed on fewer than 15% of the applicable workers, along with 7 recorded observations of tennis shoes where safety shoes should have been worn and 13 observations (out of 23) where eye protection was missing. The other two sites were in between for these items.

All sites had problems with hearing protection but this is a subjective assessment by the author as measurements were not taken. Additionally there were 32 recorded instances of an individual working on or over the side, above a 6 foot or greater drop, without a safety belt or safety line. These are in addition to those instances recorded under drops above.





## Ladders

There were no recorded instances of excessive length or horizontal use of ladders. However, of the 84 ladders observed during this study, 31 did not extend 36 inches past the landing (or have grabrails) and 58 were completely unblocked and unsecured. That is 69% of all ladders observed on site during this survey were ( by OSHA standards) potentially able to topple or slide when in use.

In practice the actual danger is somewhat lower. The author personally tested each ladder recorded as an observation and while several felt very unstable, the majority, due largely to their own weight or perhaps their height/own weight ratio, felt sturdy and useable even though unblocked and unsecured.

## Environment

Illumination, sound levels, heating/ventilation, debris accumulation and horseplay were subjective in nature. Measurements were not made and generally conditions appeared to be adequate. Debris accumulation was the most noted of these items.

At one site, there was a considerable problem with lighting, sound levels and ventilation. This occurred while laying asphalt courses in the already enclosed lower level. It received minimal attention from the site superintendent.

Nails left in boards were a problem when debris was gathering, but three of the four sites controlled this hazard well. Stacking was usually not applicable, and when it was the delivery crews were responsible for the



stacks that were in violation. The construction crews usually just left the stacks be and eventually they were used up and the problem disappeared.

Chutes were needed at one site and were never installed. The author observed several instances of debris being thrown through wall and floor openings a distance of approximately 25-30 feet, or more, to the ground with ground level workmen in close proximity to the impact points.

### Flammables

This was the least useful category. Flammables were generally not used at any of the sites during this study. More importantly, even when the author believed that flammable materials were in use, it was impossible to make a verifiable determination of that fact from the containers present or the knowledge of the workmen involved. For this category to produce effective results a more properly trained observer is required.

### Trenches

Of the 4 sites, 3 had only temporary trenches. Usually only 1 or 2 that satisfied the depth requirements for consideration. However, without exception all of these trenches were in violation in some way.

The fourth site was primarily a trenching and utilities installation project. This site was in major violation and unsafe throughout the study. The trenches at this site did not have proper exits; at one point only one existed for an entire block-length run.

These trenches were improperly shored without lateral support and sheeting only extending part of the way up the trench wall vertically. Many sections were unbraced and unsecured with unconnected sections of



plywood as thin as 3/16". Initially over 50% of the trench length was totally unshored. Where it was "shored" many of the plywood sheets were just leaned against the trench wall, resting, without any further effort being applied to installation. It was evidently intended to create the appearance of bracing to a distant or casual observer.

These conditions improved somewhat when outside attention was directed at this jobsite. However, the improvements were modest in scope and were never entirely satisfactory, in the author's opinion.



## Appendix D

### EXAMPLE OF A COMPLETED D.E.E.P. L.E.F.T. SAFETY SURVEY FORM





The Pennsylvania State University  
Thesis Data Form III-01

**D.E.E.P. L.E.P.T.**  
**SAFETY SURVEY DATA SHEET**

(Drops-Electrical-Employer-Personal Ladders-Environment-Flammables-Trenches)

SITE \_\_\_\_\_ time \_\_\_\_\_ date \_\_\_\_\_

**DROPS** 1926.500 - 502, 1926.750 & 1926.450 - 451

L <sub>2</sub>	Gm-1
I	I
moving cas	I
NJ	
NJ	
NJ	
3	2

Floors, platforms > 6' drop -- rail & toeboards

Wall openings (  $\leq 3'$  above floor )  $> 4'$  drop — rails or covers — S. end. — in. 5

Runway, 4' drop -- rail and toeboards - *new*

Roof, 16' drop — safety warning lines or belts

Floor openings (1" min.) rail/toeboards or secured cover

Other > 25' drops -- safety net (8' extension) or temp floor < 30' below

Scaffolds (> 10' high) -- rails and toeboards (plus midrails if mobile) *Adm 1910.23*

planks: 2 wide, with wire mesh (on sides) if workers below

2x11' no side no 7/13

**ELECTRICAL** 1926.400 - 404, 1926.954 & 1926.300-304

ノ	〜
ノ	ノ
ノ	ノ
ノ	ノ
ノ	ノ

**All electrical equipment grounded**

### Grounding circuits -- fault protected

- Power tools -- "assured" grounding program or GCI

Moving parts -- all covered or guarded

Live parts -- all guarded, covered if > 50 V.

**EMPLOYER RESPONSIBILITIES** 1926.16, .20, .21, .23, .24, .28, .32(j),  
.50(f), 1926.150

-	-
	✓
	✓
17	1-
	1
	X

OSHA notices -- posted, incl. 200/ann. survey Feb-Mar.

Accident logs -- maintained, incl OSHA 200

Emergency phone #'s -- posted

Site safety plan -- posted

**First aid equipment — must provide**

Instruction (general) — must provide

**Pers. safety equip -- must require it to be worn**

Fire alarms/system -- must provide & method/system posted.

Fire protection — must provide, 1 ext. or hose per 3000 SF (L. MAX = 100' + 1/floor min. + 1/(adj) stairway + 1/flammable (5' or 5 gals.) site w/in 50'.



**PERSONAL PROTECTION** 1926.100 - 104 & 1926.52

16	100%
16	100%
1	100%
3	2
-	-
N	

Hardhats -- "whenever there is a danger..." 100%

Shoes -- "must comply..." ~ 100%

Hearing prot. -- "when required" (measurement needed)

Eye & face prot. -- goggles when chipping grinding, chem ops. or machining; Welders eq. when welding or w/ molten metals

Safety belts -- lifelines 3/4", safety lines 1/2" or equiv.

NGT 6' drop w/fall

**LADDERS** 1926.450

1	-
1	1
5	5

Length -- single: 30', double: 24' maximums

Extension past landing -- 36" minimum or grab rails

Secured or blocked -- required -- never to be used

NONE horizontal

**ENVIRONMENT** of the site 1926.52, .56, .250, .252

1	
1	
1	
1	
1	
1	
1	
3	
1	
1	
1	
1	
1	
1	
1	

Illumination -- generally 5 ft. candles

Sound levels -- general (8 hr.) 90 dBA maximum

Heating/Ventilation -- must be "adequate"

Debris -- must be clear in work areas, passageways and stairways

Gas cylinders -- stored and secured in upright position

Horseplay -- specifically prohibited in work areas

Nails -- turned down or removed (must be removed if stacked) Be careful - 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

Stacking -- Bags: cross key &amp; step back if &gt; 10' high

Bricks: max. 7' high, tapered &gt; 4' high

Masonry: tapered &gt; 6' high

Lumber: 16' high max.

Placement (all): not w/in 6' of hoist or 10' of edges

Chutes -- required for disposal drops &gt; 20'

**FLAMMABLES** 1926.152

1	
1	
1	

5 gal. or 5" -- fire ext or hose w/in 50'

25 gal. + -- separate storage, secured to prevent toppling and/or sliding

All -- storage areas must be marked with flammables sign(s)

**TRENCHES** 1926.650 - 652

1	1
4	2

Exits -- w/in 20 lf if = or &gt; 4' deep

Shoring -- "sufficient to protect" lf = or &gt; 5' deep or slope to angle of repose or greater.

Placement of material -- not w/in 2' of edges

R.O.T. for repose -- rock: 90 deg., comp. gravel: 63 deg., Avg.: 45 deg., Comp. sharp sand: 33 deg., Loose sand: 26 deg.



## Appendix E

### DEFINITIONS OF SOME LEGAL TERMS



The following list of definitions are the author's own working understanding of these terms. The definitions relate specifically to the thesis topic and are not intended to be legal quotations. They are provided as a courtesy to the reader.

**Agency** - The principle that allows an employee's actions to have the full force and effect that would have applied if the employee's boss had performed them personally

**Cause of Action** - In layman's terms it is the same thing as "having a case." It is an item that one party alleges the other party is guilty of. At least one item must be identified in order to proceed with a legal action.

**Citation** - This has two meanings. The first indicates that a case was referenced. The second meaning is the format for documenting a case that is referenced. The format is always of the form, "volume, series, page number." The year may be included but that varies with the source.

**Common Law** - The principles of law based on the rights to redress that all individuals have. Most of these principles appear to date back to conventions established in English law.

**Contravention** - Contrary to or in opposition to something. The use of this term allows a slightly different sentence structure.

**Derogation** - Similar to Contravention except it implies opposition sufficient to reduce the status of the opponent.

**Indemnification** - A legal principle that allows contractual language to leave one party the burden of paying for judgements against the other party.

**Negligence** - Hard to define. See the discussion in Chapter 3. Briefly, it concerns actions that a jury rules were not those that would have been taken by a reasonable man.

**Subrogation** - A legal principle that allows the party which paid the compensation to try and recover that amount from a negligent third party that was also involved in the accident.





**Tort Action** - A lawsuit where one party claims a right to restitution based on another party's negligence.

**Trespass** - Terminology used by some Pennsylvania judges in their decisions when referring to a specific type of tort action. This refers to trespass on rights not the commonly used connotation of trespass over property boundaries.









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Thesis

B4545 Berry

c.1 Investigation of the  
public owner's liability  
and responsibility in  
construction contract  
injury prevention.

Thesis

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